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With the tenacles of government regulatory agencies reaching into all aspects of modern life, some conflict between religious organizations and these agencies is inevitable. The problem is not a new one,[1] but recently the conflicts have become more frequent and more substantial: agencies and churches have fought over laws,[2] anti-employment discrimination laws,[3] minimum standards for private schools,[4] and labor relations laws.[5]

Quite obviously, these encounters raise issues of great importance. As a nation, we have assigned religious values a central role in both our constitution and our social environ, yet we have strenously tried to avoid state promotion, impairment, or involvement with religion. This governmental neutrality has not been easily maintained, even in simpler times; and the growth of government regulation has strained our commitment to separation of church and

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1. For example, the Mormons in the 19th century and the Jehovah's Witnesses in earlier decades of this century had frequent encounters with government regulation. *See* Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944); Reynolds v. United States, 98 U.S. 145 (1878).

2. Mitchell v. Pilgrim Holiness Church, 210 F.2d 879 (7th Cir. 1954), *cert. denied*, 347 U.S. 1013 (1954) (FLSA applied to church's printing operation); Marshall v. Pacific Union Conference of Seventh Day Adventist, Civ. No. 75-3032-R (D.C. Cal. March 23, 1977) (FLSA Equal Pay Act applied to lay employees of church educational branch).

3. McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972) (Title VII of Civil Rights Act cannot, consistently with the first amendment, apply to church-minister relations). *See also* Hubbell, *Civil Rights Impact on the Church*, 21 CATH. LAW. 339 (1975).

4. Ohio v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976). *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972) (members of Amish faith could withdraw their children from public schools after 8th grade in order to provide alternative education at home and to preserve free exercise rights).

5. *E.g.*, Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112 (7th Cir. 1977), *cert. granted*, 98 S.Ct. 1231 (1978); Caulfield v. Hirsch, 95 L.R.R.M. 3164 (E.D. Pa. No. 76-279 July 7, 1977), *cert. denied on interloc. appeal*, 98 S.Ct. 3071 (1978).

state. The choices are not simple. Real and substantial societal concerns, as in ending sex discrimination or preventing labor strife, are implicated by the regulatory activities and are pitted against important religious interests and a growing movement to restrict governmental pervasiveness.

The conflict between the regulatory agencies and the churches poses penetrating questions regarding the meaning of, and the interplay between, the first amendment's two religion clauses.[6] The establishment clause prohibits government from making any law respecting the establishment of religion, and the free exercise clause prohibits government from impairing the free exercise of religion. Between them, they have created a tension that the Supreme Court has struggled to keep taut for at least thirty years.[7]

By intruding into the operations of a religiously affiliated institution, government regulation can impose unjustifiably inhibitory burdens on, and become excessively entangled with, the institution. The regulatory scheme could thereby violate both the free exercise and establishment clauses. The nature and extent of the intrusion and the character of the institution are the principal variables that determine the regulation's legitimacy. These variables interlock the two clauses, and that interlocking creates an excellent opportunity for observing the relationship and interdependence of the policies that undergird the religion clauses.

To illustrate the first amendment implications of government regulation of church-affiliated institutions, this article will focus on the assertion of jurisdiction by the National Labor Relations Board (NLRB) over employment relations between teachers and parochial primary and secondary schools. Several major controversies have developed recently between the schools and the Board,[8] and those

6. The relevant portions of the first amendment's "establishment" and "free exercise" clauses read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." U.S. CONST. amend. I.

7. The Court first discussed the relationship between the free exercise and the establishment clauses, and first applied the latter to the states through the 14th amendment in Everson v. Bd. of Educ., 330 U.S. 1 (1947).

8. The cases cited in note 5 *supra* found the NLRB's regulation of parochial school teachers to be unconstitutional. In addition, *see, e.g.*, Cardinal Timothy Manning, 223 N.L.R.B. 1218 (1976), *appeal docketed*, No. 77-1286 (9th Cir. Jan. 31, 1977); Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. 249 (1975). Commentators have also noted the confrontation. Serritella, *The National Labor Relations Board and Nonprofit, Charitable, Religious Institutions*, 21 CATH. LAW. 323 (1975); Note, *The Free Exercise Clause, the NLRA, and Parochial School Teachers*, 126 U. PA. L. REV. 631 (1978) [hereinafter cited as *Free Exercise Clause*].

cases have crystalized the elements and issues that control administrative regulation of church-related institutions.[9]

Part I of this article provides essential background on NLRB decisions regarding regulation of parochial schools and presents the Board's rationales for exercising its jurisdiction. Part II scans the doctrines that have evolved for construing the first amendment religion clauses, with attention directed first at free exercise cases, and then at establishment clause developments. Part III suggests an appropriate analytical model for regulation cases and then applies this model to NLRB regulation of parochial schools and teachers. The discussion culminates in Part IV, which identifies pluralism and individualism as the overriding first amendment values interrelating the religion clauses.

The article unabashedly maintains, through the analysis in Parts III and IV, that NLRB regulation of parochial schools and their teachers impermissibly intrudes upon the decision-making processes which the first amendment has committed to private individuals and institutions. The inhibitory effects and church-state entanglement caused by the Board's regulatory activities and powers violate both the free exercise and establishment clauses.

I. NLRB Background

Congress passed the National Labor Relations Act[10] in 1935 to secure for workers the rights to organize and bargain collectively, and to assuage the causes of serious labor disputes that were obstructing commerce.[11] The Act created a National Labor Relations Board to develop and administer employment relations law through adjudication, supervision, and rulemaking.[12] Today, the Board's responsibilities include conducting elections, investigating and processing charges of unfair labor practices, and determining the appropriate remedy when an unfair practice is found.[13] The Board's jurisdictional powers have consistently been construed to be coex-

9. The Supreme Court has recognized significance of these issues by agreeing to hear argument in NLRB v. Catholic Bishop of Chicago, 98 S. Ct. 1231 (1978), *granting cert. from* 559 F.2d 1112 (7th Cir. 1977).

10. 29 U.S.C. § 151 (1970).

11. Findings and declaration of policy, National Labor Relations Act [hereinafter cited as NLRA], § 1, 29 U.S.C. § 151 (1970).

12. NLRA, § 3, 29 U.S.C. § 153 (1970).

13. NLRA, §§ 8-11, 29 U.S.C. §§ 158-161 (1970).

tensive with the reaches of the federal commerce clause.[14]

The Board has, however, exercised discretion in asserting its jurisdiction, and has generally declined to act when the effect on commerce is *de minimis* or when countervailing policies militate against Board involvement.[15] Prior to 1970, the Board thus declined to enter into regulation of noncommercial educational or religious institutions.[16] The Board did, however, regularly exercise jurisdiction over church-owned facilities that had commercial characteristics, even if nonprofit.[17]

The Board adhered to its commercial/noncommercial distinction in dealing with religious and educational institutions through 1970, when, in a major shift of policy, it decided *Cornell University*.[18] Changed economic conditions persuaded the Board that it should assert jurisdiction over employment disputes at Cornell and Syracuse Universities. By the Board's standards, the schools had grown to have substantial impact on interstate commerce, both in their economic activities and in their acceptance of out-of-state students.[19] Moreover, labor disputes had become much more commonplace on college campuses, and a need for uniform and comprehensive treatment of those problems had developed.[20] The increasingly active role of the federal government in financing and influencing

14. *E.g.*, NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224 (1963). *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 21-22 (1976).

15. *E.g.*, Association of Hebrew Teachers of Metropolitan Detroit, 210 N.L.R.B. 1053 (1974); Hollow Tree Lumber Co., 91 N.L.R.B. 635 (1950). *See generally*, GORMAN, *supra* note 14, at 22-26.

16. *E.g.*, Lutheran Church, Missouri Synod, 109 N.L.R.B. 859 (1954); Columbia University, 97 N.L.R.B. 424 (1951). In *Lutheran Church Synod*, the Board declined jurisdiction over a small, nonprofit radio station that presented religious and classical music, public service programs, news, and religious features, but no advertising. The Board concluded that the exercise of jurisdiction over such institutions did not effectuate the Act's purposes; impact on commerce was small and labor unrest slight.

17. *E.g.*, Sunday School Bd. of the Southern Baptist Convention, 92 N.L.R.B. 801 (1950) (church publishing arm that edited, published, and distributed religious materials for the church's Sunday schools and its retail store was sufficiently wrapped in commerce to warrant NLRB intervention).

18. 183 N.L.R.B. 329 (1970), *overruling Columbia University*, 97 N.L.R.B. 424 (1951). In *Cornell*, the employers, Cornell and Syracuse Universities, had petitioned for NLRB jurisdiction in order to avoid subjection to the less accommodating New York state labor law agency. Brown, *Professors and Unions: The Faculty Senate: An Effective Alternative to Collective Bargaining in Higher Education?*, 12 WM. & MARY L. REV. 252, 304 n.208 (1970); Kahn, *The NLRB and Higher Education: The Failure of Policymaking through Adjudication*, 21 U.C.L.A.L. REV. 63, 64-65 n.2 (1973).

19. 183 N.L.R.B. at 329-30, 332-34.

20. *Id.* at 334.

higher education helped to justify NLRB intervention.[21]

The Board nudged its jurisdiction further into the area of education and religion with its opinion in *First Church of Christ, Scientist in Boston, Mass. (Christian Scientists)*,[22] which ordered a church to negotiate with electricians and carpenters employed in the church's Boston complex. The complex included a substantial publishing operation and several buildings with stores and apartments. The employer contended that its religious beliefs compelled it to publish and propagate its message, that a substantial part of the employees' time was spent on facilities used for religious purposes, and that the Board was, therefore, unable to intervene in a manner consistent with the free exercise clause. The Board rejected that conclusion by invoking the Jeffersonian distinction between "belief" and "conduct"—the former being absolutely protected, the latter only to the extent it does not conflict with an overriding state interest.[23] The Board said it had a "compelling" interest in avoiding or minimizing industrial strife and the church could claim no greater first amendment immunity than lay employers who in prior cases had made free exercise claims against labor relations restrictions.[24] Finally, the Board found the Christian Science Church employees to be engaged in activities that were "in the normally accepted sense commercial."[25] There was, therefore, no reason for the Board to withhold its jurisdiction as a matter of discretion.

Building on *Cornell* and *Christian Scientists*, the Board extended its jurisdiction in *Roman Catholic Archdiocese of Baltimore*[26] to

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21. *Id.* at 332.

22. 194 N.L.R.B. 1006 (1972).

23. *Id.* at 1007. *See* Reynolds v. United States, 98 U.S. 145 (1878) (Mormon practice of polygamy was "conduct" and thus, according to Jeffersonian thought, not entitled to absolute first amendment protection); Little, *Thomas Jefferson's Religious Views and Their Influence on the Supreme Court's Interpretation of the First Amendment*, 26 CATH. U. L. REV. 57 (1976). For further discussion, and criticism, of the belief-conduct distinction, *see* notes 34-36, 43-48 and accompanying text *infra*.

24. 194 N.L.R.B. at 1007-08. The Board relied heavily on decisions that rejected free exercise defenses by individual employers who claimed compliance with NLRA would violate their religious tenets. *E.g.*, Cap Santa Vue v. NLRB, 424 F.2d 883 (D.C. Cir. 1970); Western Meat Packers, Inc., 148 N.L.R.B. 444 (1964), *enf. denied on other grnds.*, 350 F.2d 804 (10th Cir. 1965). The Board saw no reason to allow "greater [1st amendment] protection" to churches than to individuals. 194 N.L.R.B. at 1008. There was no analysis of Board-Church entanglement. For a contrary view of the applicability of *Cap Santa Vue* and similar decisions, see Free Exercise Clause, *supra* note 8, at 668-71; see also notes 244-248 and accompanying text *infra*.

25. 194 N.L.R.B. at 1009.

26. 216 N.L.R.B. 249 (1975). The Board had previously exercised jurisdiction over a few parochial schools, *see* Henry M. Hald High School Ass'n., The Sisters of St. Joseph, 213

include parochial schools. The Board there grouped the five Catholic secondary and elementary schools of Baltimore into a single bargaining unit through their archdiocesan structure. The Board concluded that the schools' collective impact on commerce and their potential for disruptive labor relations justified Board intervention.[27] Naturally, the archdiocese contended that the schools' religious character precluded NLRB supervision of their employee relations. The Board rejected the argument by distinguishing between "completely religious" schools and those that are "just religiously associated." The Board would decline to exercise jurisdiction "only" for completely religious schools. Because the archdiocese schools did not limit their instruction to religious matters, they were characterized as just religiously associated and hence appropriate subjects for NLRB regulation.[28] "That the Archdiocese seeks to provide an edu-

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N.L.R.B. 415 (1975); Roman Catholic Archdiocese of Newark, 204 N.L.R.B. 159 (1973), but *Baltimore* was the first time that the Board considered the full statutory, policy, and constitutional implications of asserting its jurisdiction over such institutions.

27. 216 N.L.R.B. at 250. Labor unrest had already hit New York City's and San Francisco's Catholic schools, and the American Federation of Teachers had undertaken full-scale efforts to organize private schools. Boles, *Persistent Problems of Church, State, and Education*, 1 J.L. & EDUC. 601, 605 (1972).

28. 216 N.L.R.B. at 250. *See also* Archdiocese of Philadelphia, 227 N.L.R.B. 1178 (1977); Cardinal Timothy Manning, 223 N.L.R.B. 1218 (1976). The completely religious/religiously associated distinction had an insecure precedential basis when the *Baltimore* case was decided. The Board has cited *Lutheran Church Synod*, 109 N.L.R.B. 859 (1954), as authority, but there the employer, a radio station, did much more than disseminate religion. *See* note 16 *supra*. In 1974 the Board had, in its discretion, declined jurisdiction over two small Jewish school systems. The employer in Board of Jewish Education of Greater Washington, D.C., 210 N.L.R.B. 1037 (1974), provided religious training to high school students and trained teachers in Judaism and Hebraic studies. Sessions were conducted during the evenings and on weekends, were nonprofit, and were "operated for the sole purpose of furthering Jewish education among the Jewish population in the Greater Washington area." *Id.* at 1053. *Accord*, Association of Hebrew Teachers of Metropolitan Detroit, 210 N.L.R.B. 1053 (1974) (ALJ opinion). The rationale in these cases, however, indicated that the Board was more persuaded by the schools' slight impact on commerce than by their completely religious character. *see, e.g., id.* at 1058 ("sectarian religious purpose is not a sufficient reason . . . to refrain from asserting jurisdiction"). Moreover, the schools taught more than just Jewish religion; they also instructed in language and Hebrew culture.

Compare the Board's completely religious/religiously associated distinction *with* the tripartite breakdown of religious institutions in Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175, 1182-83 (1974) [hereinafter cited as *Establishment Clause*] ("Pervasively religious," as in churches and seminaries; "materially religious," as in most parochial schools; "collaterally religious," as in church-affiliated colleges), and *with* the Supreme Court's distinctions between parochial grade schools and church-supported universities. *E.g.*, Tilton v. Richardson, 403 U.S. 672 (1971) (church-supported higher education can receive direct federal aid for secular instruction); Lemon v. Kurtzman, 403 U.S. 602 (1971) ("pervasively religious" elementary and secondary

cation based on Christian principles does not lead to a contrary conclusion. Most religiously associated institutions seek to operate in conformity with their religious tenets."[29]

Subsequently, the Board has routinely engaged its regulatory powers in labor disputes involving parochial school systems in large urban areas.[30] It has persisently rejected churches' claims that such assertions of power interfere with first amendment rights to freedom of religion. "Rather", the Board has reasoned, "the Act seeks to maintain and facilitate the full flow of commerce through the stabilization of labor relations."[31] The Board insists this purpose can be accomplished with only "minimal intrusion on religious conduct" and the intrusion is "necessary" to achieve that legitimate governmental purpose.[32]

Several implicit, but largely unarticulated, assumptions underlie the Board's reasoning in deciding to regulate parochial schools. First, the Board assumes that it can separate the nonsecular activities from the secular operations of the school. Secondly, the Board has, following *Christian Scientists,* characterized the schools' religious mission as merely "conduct," to be distinguished from "belief," and has assumed that the schools are, therefore, entitled to less (if any?) protection. Thirdly, the Board has taken for granted that the need to regulate labor relations in parochial schools effects a compelling state interest. (To date, the Board has characterized its purpose only in general terms, that is, in terms of stabilizing

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schools could not receive state aid for teachers' salaries in secular subjects). *See* notes 104-106 and accompanying text *infra.*

29. 216 N.L.R.B. at 250.

30. Archdiocese of Philadelphia, 227 N.L.R.B. 1178 (1977); Diocese of Ft. Wayne-South Bend, Inc., 224 N.L.R.B. 1226 (1976); Cardinal Timothy Manning, 223 N.L.R.B. 1218 (1976); Catholic Bishop of Chicago, 220 N.L.R.B. 359 (1975); Roman Catholic Church in the State of Hawaii, Case No. 37-RC-2081, NLRB Region 537, Honolulu, Hawaii (filed July 18, 1975). *See also* Henry M. Hald High School Ass'n., The Sisters of St. Josph, 213 N.L.R.B. 415 (1974) (1st Amendment claim not made before the Board); Roman Catholic Archdiocese of Newark, 204 N.L.R.B. 159 (1973).

31. Cardinal Timothy Manning, 223 N.L.R.B. 1218 (1976).

32. *Id.* at 1218 (citing Cantwell v. Connecticut, 310 U.S. 296 (1940) and *Christian Scientists*). Simultaneously with its assertion over parochial schools, the Board has extended its jurisdiction to include other charitable, educational, and nonprofit institutions. *E.g.,* Colonial Williamsburg Foundation, 224 N.L.R.B. 718 (1976) (nonprofit philanthropic organization); Catholic Charities of Buffalo, 220 N.L.R.B. 9 (1975); Jewish Orphan's Home of S. Calif., a/k/a Vista del Mar Child Care Serv., 191 N.L.R.B. 32 (1972); First Congregational Church of Los Angeles, 189 N.L.R.B. 911 (1971) (church-owned-and-operated cemetery); Shattuck School, 189 N.L.R.B. 886 (1971) (private, nonprofit, in-residence secondary school).

labor relations generally rather than in church schools specifically.)[33]

Thus the Board has now firmly established that it has the power to, and that it should, regulate labor relations in those parochial schools that are not "completely religious." The test can be taken literally. As demonstrated, application of this test has clearly resulted in bringing the typical urban parochial school system within the NLRA's purview. The first amendment and policy implications of that inclusion are substantial and demand careful consideration.

II. First Amendment Background

As noted above, the first amendment causes a bifurcated treatment of religion. The free exercise clause prohibits unjustified government interference with religious belief and practice, and the establishment clause disallows state attempts to further, discriminate between, or inhibit particular creeds. This section provides the decisional background on these constitutional proscriptions, a background that is necessary for meaningful appreciation of their impact on governmental regulation of church schools. To aid clarity, the case law under each religion clause is developed separately.

A. *The Free Exercise Clause*

The free exercise clause guarantees the individual the right to practice a religion (or no religion) according to dictates of conscience. This unquestionably includes the freedom, which "in the nature of things, is absolute," to believe as one pleases, and to be free from officially compelled thinking.[34] Thus, "[g]overnment may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold reli-

33. For a criticism of that characterization and its effect on the first amendment balancing, see notes 46-49 and accompanying text *infra*.

34. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 218 (1963); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940). When the government attempts to exercise thought control in religious matters, both the free exercise and the establishment clause are offended; the latter precludes government from imposing religious beliefs on citizens, and the free exercise clause protects the individual's right to believe whatever he/she wants to believe. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97 (1968). *Compare School Dist. of Abington Township* (establishment clause prohibits Bible readings and prayer in public school), *with* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (free exercise clause prohibits compelled flag allegiances over religious objections).

gious views abhorrent to the authorities."[35] Problems arise, however, when beliefs manifest themselves by conduct that conflicts with legitimate state interests. In such circumstances, the Supreme Court has balanced the governmental interest against the individual's first amendment rights. Any state interference with religiously motivated conduct must be justified by some countervailing legitimate state interest that cannot be furthered by less intrusive means.[36]

Challenges to governmental actions which constrain individuals' religious beliefs, unattached to conduct, have infrequently reached the Supreme Court.[37] The Court has invalidated state attempts to compel children with religious objectives to pledge allegiance to the flag;[38] to require belief in God as a test of office;[39] to prohibit the teaching of evolutionary theories of man's origins;[40] and to discriminate between citizens or groups, solely on the basis of their religious beliefs, in the allocation of a public forum.[41] "If there is any fixed star in our constitutional constellation," stated Justice Jackson so

35. Sherbert v. Verner, 374 U.S. 398, 402 (1963). *See also, e.g.*, Torcaso v. Watkins, 367 U.S. 488 (1961); Murdock v. Pennsylvania, 319 U.S. 105 (1943).

36. *E.g.*, Sherbert v. Verner, 374 U.S. at 407. *See* notes 70-76 and accompanying text *infra*.

37. The cold war and the McCarthy "Red-scare" era, however, engendered many state attempts at some form of political thought-control, many of which were challenged and reached the Supreme Court. The loyalty oath cases offer one example. *E.g.*, Elfbrandt v. Russell, 384 U.S. 11 (1966); Baggett v. Bullitt, 377 U.S. 360 (1964); Wieman v. Updegraff, 344 U.S. 183 (1952). *See also* cases cited in notes 38 and 40 *infra*.

38. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973); Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972) (Clark, Ret. J., sitting by designation) (compulsory ROTC in public school violates free exercise rights of those with religious objections). *But see* Hamilton v. Regents, 293 U.S. 245 (1934) (compulsory ROTC at state university did not violate free exercise rights of those with religious objections). *See also* Wooley v. Maynard, 430 U.S. 705 (1977) (state cannot compel motorist to display state motto, to which he has religious objections, on his license plate); Russo v. Central School Dist., No. 1, 469 F.2d 623 (2d Cir. 1972) (teacher cannot be compelled to salute the flag); Holden v. Bd. of Educ., 46 N.J. 281, 216 A.2d 387 (1966) (Black Muslim children in public school could not be forced to salute flag even though their objection could be characterized as political). *See generally* Annot., 51 L. Ed. 2d 924 (1977).

39. Torcaso v. Watkins, 367 U.S. 488 (1961). *See also* McDaniel v. Paty, 98 S. Ct. 1322, 1329-36 (1978) (Brennan, J., concurring) (disqualification of ministers from public office is an "absolute" violation of first amendment).

40. Epperson v. Arkansas, 393 U.S. 97 (1968). *Accord*, Daniels v. Waters, 515 F.2d 485 (6th Cir. 1975); Moore v. Gaston County Bd. of Educ., 357 F. Supp. 1037 (W.D.N.C. 1973). *See generally Le Clerq, The Monkey Laws and the Public Schools: A Second Consumption*, 27 VAND. L. REV. 209 (1974).

41. *See* Cox v. New Hampshire, 312 U.S. 569 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. Griffin, 303 U.S. 444 (1938).

eloquently in the flag case, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[42] Such cases are usually made easy by the absence of any legitimate or substantial state interest. To control beliefs cannot be a governmental goal in itself, and the Court has persistently found such efforts to be an improper means of reaching some otherwise legitimate state purpose.[43] "Penalties" on religious beliefs have also been said to be "absolutely" prohibited.[44] Indeed, the Supreme Court in *Sherbert v. Verner* disallowed a state's denial of unemployment benefits to an otherwise eligible claimant who had refused on religious grounds to accept employment requiring Saturday hours. The denial was perceived as a penalty on the woman's religious beliefs.[45]

However, the Court has not been consistent in its characterization of what is a "penalty." *Braunfeld v. Brown*[46] sustained Sunday Blue Laws even though the state-compelled Sunday closings created a substantial competitive disadvantage for individuals whose religion required them to close on Saturdays also. The Court viewed the Blue Law as merely a regulation of conduct and an "indirect burden" on religion.[47]

The belief-conduct distinction is difficult to apply, particularly when the conduct and belief are so intertwined that prohibiting the former would seriously disrupt the latter.[48] The distinction has been engaged to legitimize state action that is arguably motivated by prevailing religious and moral beliefs. The Sunday Blue Law cases are an example, but decisions sustaining anti-bigamy laws are more

42. West Virginia Bd. of Educ., 319 U.S. at 642.

43. McDaniel v. Paty, 98 S. Ct. 1322, 1336 (1978) (Brennan, J., concurring); Wooley v. Maynard, 430 U.S. 705, 717 (1977).

44. Sherbert v. Verner, 374 U.S. at 402.

45. *Id. See also* McDaniel v. Paty 98 S. Ct. at 1328 & 1331 (Brennan, J., concurring).

46. 366 U.S. 599 (1961). Justice Brennan contends, however, that *Braunfeld* was largely overruled by Sherbert v. Verner, 98 S. Ct. at 1331 n.6.

47. 366 U.S. at 606. *But see id.* at 611 (Brennan, J., dissenting).

48. The belief-action distinction has recently been subjected to much criticism from commentators and from some justices and judges. They chiefly complain that it is artificial, that it has a history of constricting free exercise rights, and that courts too often become preoccupied with characterization and overlook fundamental religious concerns. McDaniel v. Paty, 98 S. Ct. at 1330-32. (Brennan, J., concurring); Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part I: The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1387 (1967). Little, *supra* note 23, at 67-72. *See also* Catholic Bishop of Chicago v. N.L.R.B., 559 F.2d 1112, 1120 (7th Cir. 1977) (drew no distinction between belief and action).

troubling.[49] By characterizing bigamy as "conduct," and thereby less deserving of judicial protection, the Court long ago legitimized laws making bigamy a crime. For many Mormons, however, polygamy was an integral and essential element in their religious faith. The state's interests justifying the law, the Court explained, lay in protecting public morals and the traditional family unit. Those interests, however, are heavily laden with religious values and overtones, as the Court's opinion in *Mormon Church v. United States*[50] evidenced:

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49. Mormon Church v. United States, 136 U.S. 1 (1890); Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878). *See also* Musser v. Utah, 333 U.S. 95 (1948); Cleveland v. United States, 329 U.S. 14 (1946). The facts in *Mormon Church* and in *Davis* are egregious. In the former, the Court sustained the repeal of the Church's corporate charter because it promoted polygamous marriages. The effect of the repeal, according to the Court's curious interpretation of trust law, was to give Congress the power to direct and control the Church's property holdings. *Davis* affirmed the conviction of a Mormon for conspiracy to obstruct the administration of territorial law after he had voted in a public election. Before voting he had taken an oath that he did not "teach, advise, counsel, or encourage" polygamy. According to the State, his church membership violated that oath and justified the conviction. The Court reasoned: "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries . . . . To call their advocacy a tenet of religion is to offend the common sense of mankind." 133 U.S. at 341-42. One commentator has registered a telling criticism of *Davis:*

> There is not the slightest hesitation [in *Davis*] to disparage as unworthy basic Mormon beliefs about polygamy, or to employ the force of law in interfering with the inplementation of those beliefs. Moreover, the normative assumptions of Field and the Court he represented are as manifest as they are undefended. The reference to 'the common sense of mankind' reflects the Jeffersonian belief in a universal common sense that readily reveals right and wrong action to those who are in their 'right' senses. But that *is* a belief, and, so far as this author is concerned, one whose status is anything but self-evident. The same holds true for Field's convictions that polygamy tends to 'degrade woman and debase man,' and that 'few crimes are more pernicious to the best interests of society.' Those contentions are true only given the truth of certain more basic beliefs about what is and what is not valuable for human beings. Considered from Davis' point of view, the fulfillment of a command of God certainly would not be regarded as degrading to women or debasing to men.

Little, *supra* note 23, at 71 (emphasis in original). *See also* note 50 and accompanying text *infra.*

50. 136 U.S. at 49. The Court repeatedly justified its holdings in the Mormon cases by analogizing polygamy to human sacrifices. Both activities are "conduct" that less civilized people might claim is religiously motivated. Such analogies, though, avoid the hard inquiries. Banning human sacrifice can be justified under the state's power to protect individuals from homicides, but banning polygamy has no such rationale. As the quote above makes clear, polygamy was proscribed because it conflicted with, and threatened, traditional Christian beliefs, not because it triggered any independent and legitimate governmental power. The anti-polygamy laws were primarily directed at the expulsion of one belief and the imposition of another. To that end, they have been quite successful. The Mormon cases continue to be good law. *See* Cleveland v. United States, 329 U.S. 14, 18-20 (1946); *cf.* Doe v. Common-

> The organization of a community [such as the Mormon Church] for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world.

Conduct provoked by religious belief is not, however, without any protection; the state can infringe upon such conduct only if its action can be justified by a sufficiently important state interest. The appropriate "weight" needed to counterbalance religious rights has varied. *Sherbert v. Verner* required the State to show that its action was necessary to promote a "compelling" state interest.[51] While citing *Sherbert,* one of the Supreme Court's most important free exercise cases, *Wisconsin v. Yoder,* [52] was less specific: "Only a state interest of the highest order" will be "of sufficient magnitude to override the interest claiming protection under the free exercise clause."[53] Two recent decisions that dealt with conscientious objectors to the military draft laws were even more nebulous, and identified the congressional power to raise armies as merely of a "kind and weight" sufficient to override free exercise claims.[54] The Court thus concluded that the government was justified both in providing the conscientious objector exemption only to applicants who object to all wars (as opposed to particular wars) and in excluding objectors from veterans' education benefits.

Determination of the appropriate standard in free exercise cases has been made more difficult by the Court's occasional acceptance of insubstantial explanations for state infringements or penalties on religious practices. For example, the Court sustained Sunday Blue Laws because of the "neutral" state purpose in setting aside Sunday for community-wide quiet, rest, and recreation. In one of the Blue Law cases, *Braunfeld v. Brown,*[55] the Court claimed it should not

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wealth's Attorney, 425 U.S. 901 (1976), *summ. aff'g.* 403 F. Supp. 1199 (E.D. Va. 1975) (private consensual homosexual behavior can be criminally punished).

51. 374 U.S. at 406.

52. 406 U.S. 205 (1972).

53. *Id.* at 214. The court in State of Ohio v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750, 771 n.17 (1976), noted *Yoder's* citation to *Sherbert* and concluded that "sufficient magnitude" is tantamount to the compelling interest test. Others have viewed "sufficient magnitude" as indicating a "sliding scales" approach. *See* note 83 and accompanying text *infra.*

54. Johnson v. Robison, 415 U.S. 361, 385 (1974); Gillette v. United States, 401 U.S. 437, 461 (1971). *See* note 83 and accompanying text *infra,* concerning a sliding scales interpretation of *Johnson, Gillette,* and other free exercise cases.

55. 366 U.S. 599, 606 (1961). *See also* notes 46-47 and accompanying text *supra.*

strike down, "without the most critical scrutiny," any "indirect burden" on the exercise of religion. Moreover, the Court applied one of its most lenient equal protection formulations to the Blue Laws despite the presence of free exercise and establishment clause rights.[56] Those rights normally trigger a strict equal protection review.[57]

A series of decisions balancing free exercise and state interests has maintained that the state's intrusion on religious activities is permissible if the activities "posed some substantial threat to public safety, peace or order."[58] Under that rationale, the State has, over religious objections, prohibited polygamy,[59] prohibited parents from using their children to sell literature on public sidewalks,[60] and required vaccinations.[61] At the same time, state interests in maintaining safety, peace, and order have not justified taxes designed to regulate public sermons[62] and commercial distribution of religious literature.[63] Nor have those interests been sufficient to sustain the conviction of Jehovah Witnesses for distributing anti-Catholic literature and playing a phonograph record of similar import while canvassing a Catholic neighborhood.[64]

These results indicate that the appropriate balancing point between free exercise and state interest has not always been consistent. The "public safety, peace, or order" formulation has proved to be no more than a catch-phrase, which is not particularly helpful. Nevertheless, the weight and trend of the Court's holdings and language do evidence an abiding concern for the maintenance of free exercise rights. The cases have generally posed a substantial, though vaguely defined, burden for the state to meet when chal-

56. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Equal protection "is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory determination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.*

57. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). *See* McDaniel v. Paty, 98 S. Ct. at 1337-38 (White, J., concurring). On the relationship of the religion and equal protection clauses, see Gillette v. United States, 401 U.S. 437, 449 n.14 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

58. Sherbert v. Verner, 374 U.S. at 403.

59. *E.g.*, Reynolds v. United States, 98 U.S. 145 (1878). *See* notes 49-50 and accompanying text *supra*.

60. Prince v. Massachusetts, 321 U.S. 158 (1944).

61. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

62. Follett v. McCormick, 321 U.S. 573 (1944).

63. Murdock v. Pennsylvania, 319 U.S. 105 (1943).

64. Cantwell v. Connecticut, 310 U.S. 296 (1940).

lenged by free exercise rights and have made the relative weight of that burden depend upon certain identifiable factors. Thus, consistencies have developed that make the balancing process more predictable and easier to use.

First, the added weight of parental interests in rearing children places a much heavier burden on the state when it simultaneously infringes upon those interests and freedom of religion. *Wisconsin v. Yoder*[65] is the most recent and primary example. In permitting Amish parents to withdraw their children from public schools at the end of eighth grade, in order to complete their preparation "for life" on the farm and in the home, the Court explained that parental rights substantially increase the state's burden:

> [T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children.[66]

Moreover, the Court has considered these interests as compelling when raised on behalf of parents by a corporation devoted to secular and religious education. In such a circumstance, *Pierce v. Society of Sisters*[67] struck down an Oregon statute requiring children to enroll in a public school. A state can enact compulsory education laws, but it cannot require parents to subject their children to public schooling if the parents provide the offspring with an adequate, alternative education.[68]

While other decisions have recognized parental rights independently of free exercise claims,[69] the confluence of these "fundamental" rights commands that any governmental intrusion thereon be justified by a state interest of compelling proportions.

A second, well-accepted aspect of free exercise analysis requires the state to avoid the infringement if there are less restrictive alternatives available to accomplish the legislative goal.[70] Even the

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65. 406 U.S. 205 (1972).

66. *Id.* at 232.

67. 268 U.S. 510 (1925).

68. *Id.* at 534-35.

69. *E.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); Bartels v. Iowa, 262 U.S. 404 (1923); State of Ohio v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976). *See also* Moore v. City of East Cleveland, 431 U.S. 494 (1977). *But cf.* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Prince v. Massachusetts, 321 U.S. 158 (1944).

70. *E.g.*, Sherbert v. Verner, 374 U.S. 398, 407 (1963). *See generally* Note, *The Less*

Court's decisions in the Sunday Blue Law cases conceded that a statute which burdens religious observance is invalid if "the state may accomplish its [legitimate] purpose by means which do not impose such a burden."[71] The Court in *Cantwell v. Connecticut*[72] would not allow the state to prohibit the dissemination of literature and ideas when regulation would adequately achieve the government's desire to maintain order. The prohibitory enforcement was "overbroad" in its reach and had unnecessarily included nonobstructive activities.[73] Similarly, *Murdock v. Pennsylvania*[74] and *Follett v. McCormick*[75] held that local governments could not tax distribution of religious literature when their revenue-raising goals could be satisfied by taxing nonreligious sources. *Sherbert v. Verner,* evidencing a more exacting judicial scrutiny, put the onus on the state "to demonstrate that no alternative forms of regulation would combat [the perceived] abuses [of unemployment compensation benefits] without infringing First Amendments rights."[76]

The third, and perhaps most critical, inquiry in free exercise analysis assesses both the degree to which the individual's rights are threatened by the state action, and the degree to which the state's interests are threatened by the exercise of religion.[77] *Braunfeld v. Brown,* for example, can be rationalized as a decision in which the Court viewed the first amendment interests as insubstantial. Chief Justice Warren emphasized that the Sunday Blue Laws "impose[d] only an indirect burden on the exercise of religion." To

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Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria, 27 VAND. L. REV. 971 (1974) [hereinafter cited as *Less Restrictive Alternative*]. On the impact of alternatives in first amendment cases, *see id.* at 1011-16; Note, *Less Drastic Means and the First Amendment,* 78 YALE L.J. 464 (1969) [hereinafter cited as *Less Drastic Means*].

71. Bruanfeld v. Brown, 366 U.S. 599, 607 (1961). The *Braunfeld* Court, however, rejected a viable, less restrictive alternatives argument, that states could enact exemptions of the Blue Laws for those with religious objections to Saturday commerce. *See also* Shelton v. Tucker, 364 U.S. 479, 493-94 (1960) (Frankfurter, J. dissenting); *Less Restrictive Alternative, supra* note 70, at 1015.

72. 310 U.S. 296 (1940).

73. *Id.* at 304, 307-08. *See* Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844 (1970); *Less Restrictive Alternative, supra* note 70, at 1011-13. *See also* Broadrick v. Oklahoma, 413 U.S. 601 (1973).

74. 319 U.S. 105 (1943).

75. 321 U.S. 573 (1944). *See* Braunfeld v. Brown, 366 U.S. 599, 607 n.4 (1961).

76. 374 U.S. at 407. *See also* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("only those interests . . . not otherwise served can overbalance legitimate claims to the free exercise of religion").

77. *See* authorities cited in note 83 *infra.*

strike down such legislation uncautiously, said Warren, "would radically restrict the operating latitude of the legislature."[78] Although one could differ with the Court's assessment of the state and individual interests in *Braunfeld,*[79] there is little dispute that the Court did not perceive the free exercise rights there as weighty; therefore, the Court refused to apply a litmus paper compelling interest test.[80]

By contrast, the *Yoder* and *Sherbert* opinions emphasize that their facts did not seriously affect any state interest. In *Yoder,* the Amish children had already received an adequate base education and were fully instructed by their elders in the operation of farm and home. That is, Amish schooling provided an excellent "learning for life," which Chief Justice Burger identified as education's major and most appropriate goal.[81] In *Sherbert,* neither the husbanding of revenues nor the prevention of abuse was given much weight as justification for the state's denying unemployment compensation benefits because of a refusal to accept a particular job due to religious reasons. Requiring the state to pay benefits in such cases, the Court reasoned, imposed no great burden on the public coffers.[82]

The third free exercise inquiry—assessing the relative impact of the state action on religiously provoked conduct and vice-versa—has been characterized by some courts and commentators as creating a "sliding-scale" analysis.[83] As the state's imposition on the individual's interests increases, so does the state's burden of justification. Conversely, as the individual's obstruction of valid state goals intensifies, the burden on the state decreases. These two factors would interact and adjust the scales in each free exercise case. Certainly such an analysis is one means for aligning most of the free

78. 366 U.S. at 606. *See Less Restrictive Alternative, supra* note 70, at 1015-16.

79. McDaniel v. Paty, 98 S. Ct. at 1331 n.6 (Brennan, J., concurring); Braunfeld v. Brown, 366 U.S. at 614. (Brennan, J., dissenting).

80. *See also* Johnson v. Robison, 415 U.S. 361 (1974).

81. 406 U.S. at 211, 223. *See also id.* at 240 (White, J., concurring); State of Ohio v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976). The weight of the state interest should be only that difference between the means that infringe upon free exercise interest and any available less drastic means. Clark, *supra* note 48, at 331; *Less Restrictive Alternative, supra* note 70, at 1022-23; *Less Drastic Means, supra* note 70, at 467.

82. State courts and commentators that have addressed the *Sherbert* issue generally agree with the Supreme Court's assessment of the weight of the state's interests. *See* 374 U.S. at 407-08 n.7 and authorities cited therein.

83. Caulfield v. Hirsch, 95 L.R.R.M. 3164, 3171 (E.D. Pa. Civ. No. 76-279 July 7, 1977); Giannella, *supra* note 48, at 1390; Note, *The Constitutionality of the 1972 Amendment to Title VII's Exemption for Religious Organizations,* 73 MICH. L. REV. 538, 544 (1975); *Free Exercise Clause, supra* note 8, at 637, 666.

exercise decisions into some consistent pattern, and it could explain the rather nebulous statements in *Yoder* and the draft cases that the state interest must be of "sufficient magnitude" or of some unarticulated "kind and weight." However characterized, the assessments made in this third inquiry have been of undeniable importance to the Court's decisions.

Finally, in determining whether free exercise interests are threatened, the Court will examine both the "purpose and effect" of the challenged state action.[84] If the government, by either design or unintended result, either impedes observance of one or all religions, or discriminates between them, then it must justify the impediment under the free exercise balancing test.[85] Most free exercise cases involve challenges to facially neutral state actions that have the effect of restricting religious conduct.

As soon as an inhibitory purpose or effect is identified, the Court will balance. While some ambiguity persists regarding the precise wording of the free exercise "test," the Court's balancing has emphasized these factors:

1. The combination of religious and parental rights increases the burden on the state;
2. The existence of less restrictive alternatives increases the burden on the state;
3. The degree of governmental intrusion on the first amendment rights must be weighed along with the degree to which the state interests are, in fact, jeopardized by the exercise of religion;
4. The state interest should be "of the highest order" unless the burden on religion is slight.

B. *The Establishment Clause*

The constitutional prohibition against governmental action respecting the establishment of religion has only recently received extensive Supreme Court illumination.[86] Several social and legal

84. Sherbert v. Verner, 374 U.S. at 404; Cantwell v. Connecticut, 310 U.S. 296, 305 (1940).

85. In such circumstances, the free exercise and establishment clauses work together to demand justification from the government for its *de facto* and *de jure* discrimination. *See* Wisconsin v. Yoder, 406 U.S. 205, 214-15 (1972); Sherbert v. Verner, 394 U.S. 398, 404 (1963); Cantwell v. Connecticut, 310 U.S. 296 (1940). *See* notes 90-102 and accompanying text *infra*.

86. The Supreme Court, prior to 1947, gave only very infrequent and limited exposure to the establishment clause. *See* Quick Bear v. Leupp, 210 U.S. 50 (1908); Bradfield v. Roberts, 175 U.S. 291 (1899); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871); Terrett v. Taylor, 13

developments have, however, coalesced in the past thirty years to give the establishment clause substance and meaning.[87] The Court's decisions have usually focused upon the nation's schools. "[T]wo general categories of cases may be identified: those dealing with religious activities within the public schools, and those involving public aid in varying forms to sectarian educational institutions."[88] Hard financial times in parochial schools and more liberal standing rules have made the second set of cases the most predominant in the development of establishment clause doctrine. The issues in those cases continue to perplex the courts.[89]

The Court has developed a tripartite analysis for establishment clause challenges that has proved easy to state but difficult to apply. In reviewing state statutes conferring aid to parochial schools for use in nonsectarian subjects, the Court distilled this test:[90] "First, the statute must have a secular legislative purpose; second,

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U.S. (9 Cranch) 43 (1815). In 1947, the Court applied the clause to the states through the 14th amendment due process clause, thus facilitating constitutional review of numerous state programs in the ensuing decades. Everson v. Bd. of Educ., 330 U.S. 1 (1947).

Like the free exercise clause, the establishment clause is rooted in our Colonial experience, particularly in Virginia; and Jefferson and Madison heavily influenced the drafting and subsequent interpretations. The antecedent of the clause was Madison's *Memorial and Remonstrance,* which he wrote to attack a bill that had been introduced by Patrick Henry in the 1784 Virginia General Assembly. Henry's legislation would have assessed a tax on Virginia citizens to support teachers of the Christian religion. Each individual taxed could have designated the church that should receive the government-collected benefit. Madison's fifteen-point response spearheaded defeat of the bill and provided the foundation for passage of Thomas Jefferson's *Bill for Establishing Religious Freedom.* These documents then form the basis for the religious provisions in the first amendment. *See* PEARL v. Nyquist, 413 U.S. 756, 770 n.28 (1973). The *Bill* and the *Memorial and Remonstrance* are reprinted as appendices to Justice Douglas's dissent in Walz v. Tax Comm'n, 397 U.S. 664 (1970), and to Justice Rutledge's dissent in *Everson.*

87. The major legal development was the court's liberalization of standing requirements to permit taxpayer challenges to governmental financial support of sectarian schools. Flast v. Cohen, 392 U.S. 83 (1968). The significant social development lay in the hard times encountered by parochial schools and the corresponding efforts by the states to help them. *See generally* L. PFEFFER, GOD, CAESAR AND CONSTITUTION (1975); Louisell, *Does the Constitution Require a Purely Secular Society?,* 26 CATH. U.L. REV. 20 (1976).

88. PEARL v. Nyquist, 413 U.S. 756, 772 (1973). For a review of sample cases, see *id.* and notes 29-30 *supra.*

89. *E.g.,* Wolman v. Walter, 433 U.S. 229 (1977); Public Funds for Public Schools of N.J. v. Byrne, 444 F.Supp. 1228 (D.N.J. 1978).

90. Roemer v. Maryland Public Works Bd., 426 U.S. 736, 748 (1976); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The stated criteria for the establishment clause analysis are to be viewed as guidelines, not as rigid limitations. Hunt v. McNair, 413 U.S. 734, 741 (1973); Tilton v. Richardson, 403 U.S. 672, 678 (1971); Zoetewey, *Excessive Entanglement: Development of a Guideline for Assessing Acceptable Church-State Relationships,* 3 PEPPERDINE L. REV. 279, 295, 298 (1976).

its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'" Each of these requires separate discussion.

Ascertaining legislative purpose is a difficult task, due to the inherent difficulties in identifying some communal motive among scores of legislators.[91] In striking down Arkansas's "Monkey Law" and in banning compulsory prayer and Bible readings in public schools, the Court could confidently identify a sectarian purpose.[92] Few other cases, however, have presented determinable illicit motives that clearly had moved the legislature. Certainly, in most any case involving administrative regulation (except discriminatory enforcement), the state operates with a valid, secular purpose. Recently, the Court has accepted at face value the legislatures' purposes as stated in the statutory preambles and has focused instead on the "effect" and "entanglement" factors of its establishment clause analysis.[93]

Determinations of the validity of a statute's effects and its entanglement with religion invariably present questions of degree.[94] For that reason, the separation of church and state has become "a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[95]

The overwhelming proportion of cases that have been concerned with the establishment clause effects of government action has involved public aid to parochial schools. To prevent improper effects in such cases, the Court has tried to maintain the working premise that a state may not "pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike."[96] Again, however, the premise is more easily stated than applied. Church schools can and do receive public aid for bus transportation, therapeutic services, and secular textbooks, but not for

91. *See generally* Brest, *Palmer v. Thompson: An Approach to the Problems of Unconstitutional Legislative Motive,* 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law,* 79 YALE L.J. 1205 (1970).

92. Epperson v. Arkansas, 393 U.S. 97 (1968).

93. *E.g.,* Wolman v. Walter, 433 U.S. 229, 236 (1977); Lemon v. Kurtzman, 403 U.S. 602, 613 (1971). *See Establishment Clause, supra* note 28, at 1175, 1179, 1192.

94. *E.g.,* Meek v. Pittinger, 421 U.S. 349, 359 (1975); Zorach v. Clauson, 343 U.S. 306, 314 (1952); Zoetewey, *supra* note 90, at 283.

95. Wolman v. Walter, 433 U.S. at 236, *quoting* Lemon v. Kurtman, 403 U.S.at 614.

96. Roemer v. Maryland Public Works Bd., 426 U.S. 736, 747 (1976).

teachers, field trips, and instructional materials and equipment.[97] At first glance, the dividing line would seem to lie between those items and services inherently neutral and those "inextricably connected"[98] with a school's religious function.

Further consideration reveals that the dividing line is not so clear. The public provision of ostensibly neutral and secular materials could still have the "primary effect of providing a direct and substantial advancement of the sectarian enterprise."[99] The Court has concluded that it is impossible to separate "the secular education function from the sectarian" in parochial primary and secondary schools, and that the state aid thus inevitably flows in part to support the schools' religious role.[100] In keeping with that conclusion, the Court has permitted aid through high school grades only in those matters wholly separate from or outside the educative process, except for the anomaly of textbook provisions.[101]

The parochial school cases, of course, are examples of official efforts to advance religion. The establishment clause can also be

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97. Wolman v. Walter, 433 U.S. 229 (1977) (therapeutic services and textbooks valid; field trips and instructional materials and equipment invalid); Meek v. Pittinger, 421 U.S. 349 (1975) (textbooks valid; auxiliary and remedial instruction invalid); Lemon v. Kurtzman, 403 U.S. 602 (1971) (teacher invalid); Board of Educ. v. Allen, 392 U.S. 236 (1968) (textbooks valid); Everson v. Board of Educ., 330 U.S. 1 (1947) (bus transportation valid).

98. Wolman v. Walter, 433 U.S. at 251 n.17. *See also id.* at 259 (Marshall, J., concurring in part and dissenting in part) (the line for government funds to parochial schools should be drawn between allocations for general welfare programs, which would be permissible, and support for eductional assistance, which would be invalid).

One commentator has suggested that the "effects" test depends upon a two -stage factor analysis. "The first state examines the religious permeation of the recipient institution. The second stages weith the severability of the government aid from the religious component of the recipient institution . . . ." *Establishment Clause,* supra note 28, at 1182-86.

99. Wolman v. Walter, 433 U.S. at 250. *See also* Meek v. Pittinger, 421 U.S. at 366.

100. Wolman v. Walter, 433 U.S. at 250.

101. Most of the evils inherent in aid to parochial schools for teachers and other educational expenses exist in state money for textbooks. The difficulty in distinguishing secular from religious and the potential for fostering political divisiveness, church dependence on state funds, and misuse of materials are substantial in the textbook programs. *See* Freund, *Public Aid to Parochial Schools,* 82 HARV. L. REV. 1680, 1683, 1685-86, 1688-92 (1969). The Court has virtually admitted as much in striking down state provisions for parochial instructional materials and equipment. Wolman v. Walter, 433 U.S. at 248-51; Meek v. Pittenger, 421 U.S. 349 (1975). Yet the Court continues to adhere to its holding in Board of Educ. v. Allen, 392 U.S. 236 (1968), allowing aid for textbooks. *Wolman, supra; Meek, supra.* Justice Marshall has urged that *Allen* and that portion of *Meek* concerning the books should be overruled. *Wolman, supra,* at 257-59 (dissenting opinion). Commentators have critically noted this anomalous toleration of the textbook aid. *E.g.,* Freund, *supra;* Nowak, *The Supreme Court, The Religion Clauses, and the Nationalization of Education,* 70 NW. L. REV. 883, 890-91 (1976); Comment, 16 DUQ. L. REV. 253, 265 (1977).

engaged when governmental muscle is used either to inhibit religion or to discriminate among religions. Generally speaking, the state cannot substantially aid or impede an institution's sectarian functions.[102]

The third prong of the establishment clause test—that excessive government-church entanglement is unconstitutional—is an outgrowth of the "primary effect" inquiry. Certainly, the entangling interaction between state and church is a consequence, or "effect," of the challenged state action.[103]

To determine excessive entanglement, the Court explores four subjects:

1. The character of the affected institution;
2. The nature of the aid or impediment;
3. The resulting relationship between church and state;
4. The resulting political divisiveness.[104]

The ensuing discussion addresses these subjects in that order.

As in cases examining state action's "effects," the entanglement decisions have usually focused upon some level of parochial school, either elementary school, high school, or college. The Court has allowed legislatures much more latitude in aiding religiously affiliated universities than private and secondary church schools.[105] The colleges—at least those that are not seminary schools—are generally less pervasively religious, have fewer required religious functions and classes, and have less impressionable students than the primary and secondary schools. Churches consider the colleges to be less significant to the propagation and continuation of their beliefs. Finally, the colleges are much more likely to have a lower percentage

102. Torcaso v. Watkins, 367 U.S. 488 (1961); Catholic Bishop of Chicago v. NLRB, 559 F.2d at 1112 (7th Cir. 1977), *cert. granted*, 98 S. Ct. 1231 (1978); Giannella, *supra* note 48, at 1387-89; *Establishment Clause, supra* note 28; Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1063-64 n.51 (1978) [hereinafter cited as *Constitutional Definition*].

103. Walz v. Tax Comm'n, 397 U.S. at 674. There is a great deal of overlap in the analysis for establishment clause "effects" and "entanglement." *Establishment Clause, supra* note 28, at 1182-83, 1186-87. This lack of delineation is not particularly critical, however, given the Court's consideration and weighing of all relevant circumstances in its establishment clause cases.

104. Roemer v. Maryland Public Works Bd., 426 U.S. at 748-49; Lemon v. Kurtzman, 403 U.S. at 615, 622.

105. *Roemer*, 426 U.S. at 748-49; Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971). *See* Bradfield v. Roberts, 175 U.S. 291 (1899); *Establishment Clause, supra* note 28, at 1182-83.

of students who are members or followers of the sponsor church. In contrast, the courts have described the conditions and atmosphere in parochial elementary and high schools as pervasively religious; and any aid given to such schools has received strict judicial scrutiny.[106]

As the Court's distinction between colleges and grade schools attests, the significance of the institution in entanglement analysis lies in the extent of its involvement in, and commitment to, religious activities and propagation. The more commercial, or the more diversified, the institution is, the more government is able to become involved with it.

The nature of the government aid or impediment to religion is the second consideration in determining entanglement. The inquiry focuses on the degree to which the aid or imposition is intertwined with the religious efforts of the church. For example, fire protection and inspections, police protection, bus transporation for students, and therapeutic and medical services are ascertainably neutral and separable from the churches' religious mission. They create little entanglement and have been found to be permissible.[107]

The legislatures in *Lemon v. Kurtzman,*[108] however, wanted to help the church schools pay teachers' salaries, presumably for some portion of the secular instruction that the teachers provided. The Supreme Court was unobliging: even assuming the instructors' good faith, the pervasively religious setting and the teachers' religious training and beliefs would naturally influence the faculty to instill those beliefs in others. The government had no way, beyond gross and entangling surveillance tactics, either to predict the ability of particular teachers to convey a particular subject matter "neutrally", or to ascertain whether a teacher is, in fact, neutral in his classroom presentations. Public funding for parochial school teachers so intimately involved government with the institutions' religious mission that it generated excessive and illicit entanglement.[109]

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106. *E.g.*, Lemon v. Kurtzman, 403 U.S. 602, 615-16, 620 (1971); Catholic Bishop of Chicago v. N.L.R.B., 559 F.2d 1112, 1114 n.5 (7th Cir. 1977), *cert. granted*, 98 S. Ct. 2131 (1978). *See also* authorities cited in *Lemon*, 403 U.S. at 616 n.6.

107. Wolman v. Walter, 433 U.S. 229 (1977); Everson v. Board of Educ., 330 U.S. 1 (1947); Freund, *supra* note 101, at 1691-92.

108. 403 U.S. 601 (1971).

109. *Id.* at 617. *See also* Meek v. Pittenger, 421 U.S. at 372 n.22; Freund, *supra* note 101, at 1688-89.

The third, and probably the most critical, element in entanglement analysis examines the scope, nature, and duration of the church-state relationship which results from the extension of governmental aid or regulation. Naturally, the more involved and pervasive the government regulation becomes in the church's operations, the greater the entanglement. The point at which the entanglement reaches "excessive" is a question of degree and is often difficult to determine.[110] The intrusive impact, or the extent to which the state's activities disrupt decision-making and operation of church schools, controls.

The Court has identified certain governmental activities that are particularly suspect. For example, the subsidization of teachers' salaries, as in *Lemon,* would require constant governmental surveillance of classrooms to insure that public money was not being diverted to sectarian instruction.[111] Such surveillance would be highly offensive to our concept of church-state separation. Regular and extended inspections of church records have also been found to constitute excessive entanglement.[112]

At times, the establishment clause may require the state to accord special treatment to churches in order to avoid more entangling relationships.[113] The Court so intimated in *Walz v. Tax Commission,*[114] its first recognition of entanglement as a separate inquiry. *Walz* rejected a challenge to the long-standing tradition of providing property tax exemptions for churches. The exemptions may be compelled by the establishment clause because they create

110. Walz v. Tax Comm'n, 397 U.S. at 674; Zoetewey, *supra* note 90, at 283.

111. Lemon v. Kurtzman, 403 U.S. at 619-20. *See* Wolman v. Walter, 433 U.S. at 244; Walz v. Tax Comm'n, 397 U.S. at 674.

112. Hunt v. McNair, 413 U.S. at 746; Lemon v. Kurtzman, 403 U.S. at 620; Walz v. Tax Comm'n, 397 U.S. at 674.

113. Roemer v. Maryland Public Works Bd., 426 U.S. at 748 n.15:

> The importance of avoiding persistent and potentially frictional contact between governmental and religious authorities is such that it has been held to justify the extension, rather than the withholding, of certain benefits to religious organizations. The Court upheld the exemption of such organizations from property taxation partly on this ground. Walz v. Tax Commission, 397 U.S. 664, 674-675 (1970).

The free exercise clause enables government to facilitate religious development by the granting of exemptions for religious organizations or conduct, yet remain within the establishment clause. *E.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972) (exemption for Amish from compulsory school attendance); Dodge, *The Free Exercise of Religion: A Sociological Approach,* 67 MICH. L. REV. 679, 705-06 (1969); Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development, Part II, The Nonestablishment Principle,* 81 HARV. L. REV. 513 (1968); *Establishment Clause, supra* note 93, at 1176 n.7.

114. 397 U.S. 664 (1970).

less church-state contact than would assessment of taxes and they are more nearly neutral. Imposing the taxes would require periodic (probably annual) collections and would "giv[e] rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes."[115]

The last of the four entanglement inquiries examines the political divisiveness that the challenged state action is likely to engender. Historically the presence of government in subsidizing or compelling religion has produced emotional, bitter, and divisive factioning and disruption. "This was 'one of the principal evils against which the First Amendment was intended to protect.'"[116] In the recent school cases, the Court has assessed the government aid to church primary and secondary schools as substantially divisive. The geographical concentration of students, the essentially Catholic/anti-Catholic line drawing (with its ethnic overtones) that often results, and the schools' close ties to the church all aggravate the potentiality for political turmoil.[117]

Entanglement analysis is intended to scrupulously enforce the first amendment requirement for governmental neutrality toward religion. To accomplish that goal, the Court has been careful to avoid not ony presently-manifested entanglements, but also the potential for conflict. For example, the *Lemon* Court expressed skepticism that church school teachers with religious training and beliefs could adequately separate their faith from their teaching. Even though the Court assumed the teachers' good intentions, and there was nothing on the record to evidence abuse, the "potential

115. *Id.* at 674. *See also id.* at 698-99 (Harlan, J., concurring). The tax exemptions for churches support the establishment clause policy of "mutual abstention—keeping politics out of religion and religion out of politics." Freund, *supra* note 101, at 1686.

116. Roemer v. Maryland Public Works Bd., 426 U.S. at 749, *quoting* Lemon v. Kurtzman, 403 U.S. at 622. *See* the authorities collected in *Roemer*, 426 U.S. at 749-50 n.16. Justice Harlan, concurring in *Walz*, claimed that preventing political divisiveness along sectarian lines was a major purpose of the establishment clause. 397 U.S. at 695.

117. *See* Roemer v. Maryland Public Works Bd., 426 U.S. at 765. The political divisiveness inquiry in establishment clause analysis has received criticism because it is difficult to evaluate and apply. *See* Nowak, *supra* note 101, at 906-07; *Establishment Clause, supra* note 93, at 1189; Note, *The Sacred Wall*, 67 Nw. U.L. Rev. 118 (1972); Comment, 86 Harv. L. Rev. 1068, 1101-02 (1973). Such difficulties may explain why the Court has not developed or relied upon the political divisiveness test in its recent decisions. *E.g.*, Wolman v. Walter, 433 U.S. 229 (1977); *Roemer, supra*. The Court has admitted that the test should merely be regarded as an important "warning signal," but not as an independent means for invalidation. PEARL v. Nyquist, 413 U.S. 756, 797-98 (1973).

for impermissible fostering of religion" was such that state subsidization of the teachers' salaries was invalidated.[118] In *Meek v. Pittinger*,[119] the Court perceived a similar, though reduced, undesirable potential in a provision for teachers who were publicly paid and employed to instruct remedial and exceptional students in the church schools. The presence of the auxiliary teachers had the "potential for provoking controversy between the Commonwealth and religious authorities over the extent of the teachers' responsibilities and the meaning of the legislative and administrative restrictions on the content of their instruction."[120] *Levitt v. Committee for Public Education*[121] expressed the same concerns while striking down public funding of teacher-prepared tests. A "substantial risk" existed that the tests could be used as tools for inculcation of the sponsoring church's religious precepts.[122]

The Court has, in these instances as well as in others, recognized that church-state entanglement leads to a very slippery slope, and that any ventures onto it must be cautiously made. The distinctions made in establishment clause analysis are so fine that a slight misstep could set in motion a governmental snowball capable of crushing religious independence.[123]

III. Application of First Amendment Law to NLRB Regulation of Parochial Schools

A. *Overview of Analysis*

Governmental regulation of church schools triggers both free exercise and establishment clause considerations. Regulatory intrusions into the parochial education of youth raise free exercise issues and therefore, must be justified by some sufficient state interest. Establishment clause questions are presented by governmental regulation that, as the schools will argue, preempts private decision-making in religious matters, involves government in church business and instructional functions, and pits government's power against the

118. Lemon v. Kurtzman, 403 U.S. 601, 619 (1971).

119. 421 U.S. 349, 370-71 (1975).

120. *Id.* at 372 n.22.

121. 413 U.S. 472, 480 (1973).

122. *Id.* at 480. *See also* Wolman v. Walter, 433 U.S. 229 (1977).

123. Lemon v. Kurtzman, 403 U.S. 602, 624 (1971); "A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop." *Id. See also* note 258 and accompanying text *infra*.

churches' efforts to establish, maintain, and advance their religion.

As explained in Part II-A, free exercise analysis requires a determination of whether or not the purpose or effect of state action inhibits or penalizes the practice of a religion. If there is an impediment, then a reviewing court must balance the degree of governmental intrusion on parental and religious interests against the degree to which the intrusion is necessary to achieve a legitimate state purpose. The degree of necessity must be of the highest order to outweigh the free exercise concerns.

In NLRB cases, the degree of infringement on first amendment rights must be determined by examining the religious character of the regulated institution and of the relevant employees' unit (here, teachers), and the nature and extent of the governmental intrusion, including the government's resulting relationship with the institution. The infringement on a religion ensues from the inhibitory effects and government-church entanglement caused by the regulatory scheme. In regulatory cases, then, the free exercise claim largely depends upon the same analysis as is applied to the establishment clause issues. The context is analogous to that described by the Court in *Walz v. Tax Commission;* the gross and potentially unlawful church-state interaction that would accompany tax revenue collections from churches could create excessive entanglement offensive to both the free exercise and establishment clauses.[124]

There is no question that the church and parental rights involved in the operation of a parochial school at least raise free exercise claims to a degree sufficient to set in motion the balancing process.[125] The analysis here will thus focus on the inhibitory effects of NLRB regulation and on its potential for spawning excessive church-state entanglement. The discussion will also consider, as it must, the government's countervailing rationales for needing the regulation.

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124. 397 U.S. at 674-75. *See also* Roemer v. Maryland Public Works Bd., 426 U.S. 726, 748 n.15 (1976). Thus the free exercise and establishment clauses overlap in regulatory cases, and operation of each facilitates operation of the other. *See* authorities cited in notes 85, 102, & 113 *supra.*

125. Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112 (7th Cir. 1977), *cert. granted,* 98 S. Ct. 1231 (1978); *Free Exercise Clause, supra* note 8, at 641-42. Certainly, the Supreme Court's parochiad decisions noting the religious permeation of Catholic schools would dictate that religious interests are at least affected by the NLRB regulation. *E.g.,* Lemon v. Kurtzman, 403 U.S. 602, 615-16 (1971). Wisconsin v. Yoder, 403 U.S. 205 (1972), recognized free exercise rights in mixed religious and practical training. The Board has also assumed that first amendment rights are implicated so that some balancing is required. *E.g.,* Cardinal Timothy Manning, 223 N.L.R.B. 1218 (1976).

B. *Purpose and Effect*

The NLRB does have legitimate reasons for extending its jurisdiction to include church school employers. Unquestionably, labor organizing has reached the nation's schools.[126] The Board is alert for spawning grounds of labor unrest. The Board's decisions reaching the schools have expressed concern for the harmful impact on commerce that could result from such strife and sympathy for the organizational rights of parochial school teachers.[127] There has been no intimation that the Board's reasons for regulating the schools include any anti-religious sentiments or motives.[128]

The effects of NLRB jurisdiction on an employer are substantial, and those effects manifest themselves in several ways. Certainly one consequence is greatly increased operating costs.[129] If covered by the Act, parochial schools will also experience changes in employer-employee relations and attitudes,[130] in disclosure of information requirements,[131] in some decision-making procedures, and in the hierarchical structure between administration and faculty.[132] The procedural changes are, in turn, likely to affect substantive policy.[133] These effects will be examined here to determine their scope and the degree to which they are likely to inhibit religion.

NLRB regulation will significantly increase the expenses of parochial schools.[134] Government regulation and coordinate enforce-

126. *See, e.g.*, Brown, *supra* note 18, at 254-55; Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A.L. REV. 63, 64 (1973); Special Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1498-1502 (1956) [hereinafter cited as *Michigan Project*].

127. *See* Cardinal Timothy Manning, 223 N.L.R.B. 1218 (1976).

128. *But see* Hubbell, *supra* note 3; Louisell, *supra* note 87; Serritella, *supra* note 8, at 326-30. Mr. Hubell, in particular, suggests that several recent legislative, administrative, and judicial decisions evidence an overt anti-Catholic bias.

129. *See* notes 134-143 and accompanying text *infra*.

130. *See* notes 144-148 and accompanying text *infra*.

131. *See* notes 149-155 and accompanying text *infra*.

132. The impact of the Act on decision-making and hierarchy is discussed in text accompanying notes 171-198 *infra*. *See* note 133 *infra*.

133. *See* text accompanying notes 171-198 *infra*. Entanglement is a consequence. As noted in note 103 *supra*, there is a great deal of overlap between analysis of effects and of entanglement. Thus much that is discussed under "entanglement" could also be seen as creating unconstitutional effects.

134. Brown, *Collective Bargaining in Higher Education*, 67 MICH. L. REV. 1067, 1069 (1969) (AFT primary aims are increased salaries and decreased workloads); Bucklew, *Collective Bargaining in Higher Education: Its Fiscal Implications*, 57 LIBERAL ED. 255 (1970); Kahn, *supra* note 126, at 83; Klaus, *The Evolution of a Collective Bargaining Relationship in Public Education: New York City's Changing Seven-Year History*, 67 MICH. L. REV. 1033 (1969).

ment powers enhance employees' bargaining power which, in turn, will increase payroll and employee benefit costs through both higher wages and additional personnel.[135]

Moreover, the expenses of collective bargaining are substantial.[136] Schools will be forced either to devote their own administrative personnel's time to bargaining or to hire outside negotiators. Either alternative has its costs,[137] and they are likely to escalate when the federal government oversees the bargaining and enforces the rules. Employees' time spent complying with many of those rules further inflates the price of being subjected to NLRB regulation.

In addition, of course, legal fees accompany NLRB regulation. The schools will need lawyers for effective representation in the almost inevitable unfair labor practice and certification proceedings. Appeals to federal circuit court and section 10 court appearances may also follow.[138] The breadth and detail of federal labor laws and regulations require employers to consult regularly with their attorneys.[139] Needless to say, such representation and counseling cost money.

Finally, if the NLRB can regulate parochial schools, then so can other federal and state agencies.[140] Compliance and legal costs attend those assertions of regulatory power, and further dwindle the schools' resources.

The parochial schools and their patrons can appropriately ask how they can be ineligible for any form of direct financial assistance, which they badly need, and yet be subject to costly and intricate government regulation. Admittedly, ineligibility for benefits should not necessarily mean relief from responsibility. Nevertheless, it

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135. Catholic Biship of Chicago v. NLRB, 559 F.2d 1112, 1123-24 (7th Cir. 1977), *cert. granted*, 98 S. Ct. 1231 (1978); Brown, *supra* note 134, at 1075; Brown, *supra* note 18, at 326; Serritella, *supra* note 8, at 327-28; *Michigan Special Project*, *supra* note 126, at 1499; Note, *Teacher Collective Bargaining—Who Runs the Schools?*, 2 FORDHAM URB. L.J. 505, 508, 559 n.307 (1974).

136. Serritella, *supra* note 8. Not only do employers have to bear the expense for their own preparation for, and participation in, collective bargaining, but they could also end up underwriting the employees' bargaining unit's manpower time. Axelson, Inc., 97 L.R.R.M. 1234 (1978) (employer had mandatory duty to bargain over pay for members of union's collective bargaining committee).

137. Cook & Doering, *Negotiating a Teachers' Contract: The Time Commitment for Bilateralism*, 32 ARB. J. 145 (1977).

138. N.L.R.A. §§ 8-10, 29 U.S.C. § 158-160 (1970). *See* text accompanying notes 200-208 *infra*.

139. Serritella,*supra* note 8, at 322, 331.

140. Hubbell, *supra* note 3. *See* PEARL v. Nyquist, 413 U.S. 756, 797 n.56 (1973); note 123 and accompanying text *supra;* note 258 and accompanying text *infra*.

seems basically unfair to impose governmental regulation and its attendant drain on resources without providing a fair slice of governmental largesse. There is also a doctrinal inconsistency; preventing government dollars from compromising churches on matters of religious education was a major theme in the parochial opinions. With governmental money comes governmental regulation, the Justices reasoned.[141] Now, the NLRB wishes to assert governmental regulation even though the financial assistance has been largely severed. While invalidating NLRB regulation of parochial schools, the Seventh Circuit recently noted the cruel whip-sawing effect of the Board's policy,[142] and relied upon a fairness rationale in reaching its decision:[143]

> A church which chooses to educate its own young people in schools which it is required essentially to finance without governmental aid should because of the essentially religious permeation of its curriculum be equally freed of the obviously inhibiting effect and impact of the restrictions of the National Labor Relations Act in conducting the teaching program of those schools.

In addition to the fiscal problems created by Board jurisdiction, the church schools are likely to experience a different relationship with their employees. Undeniably, the NLRA is aimed at adjusting that relationship by, among other means, providing employees with government-enforced clout. The schools would lose most of their ability to deal with employees individually; with NLRB backing, unions have obtained blanket provisions for promotions, termination grounds, and other important elements.[144] Union members have

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141. Roemer v. Maryland Public Works Bd., 426 U.S. 736, 772 (1976) (Brennan, J., dissenting); *id.*, at 775 (Stevens., J., dissenting); Meek v. Pittenger, 421 U.S. 349, 372 (1976); Lemon v. Kurtzman, 403 U.S. 602, 620-21 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970); Everson v. Board of Educ., 330 U.S. 1, 27-28 (1947)(Jackson, J., dissenting). *See also* PEARL v. Nyquist, 413 U.S. 756, 788-89 (1973); Abington School Dist. v. Schempp, 374 U.S. 203, 259-60 (1963)(Brennan, J., concurring); Freund, *supra* note 101, at 1685-86; note 279 and accompanying text *infra*.

142. Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1119 (7th Cir. 1977), *cert. granted*, 98 S. Ct. 1231 (1978).

143. *Id.* at 1130. *See also id.* at 1119.

144. *E.g.*, NLRB v. Katz, 369 U.S. 736, 745-47 (1962); National Licorice Co. v. NLRB, 309 U.S. 350 (1940); United States Gypsum Co., 155 N.L.R.B. No. 118 (1965), *enf. denied on other grnds.*, 393 F.2d 883 (6th Cir. 1968); United States Gypsum Co., 94 N.L.R.B. 112, *amended* 97 N.L.R.B. 889 (1951), *modified on other grnds.*, 206 F.2d 410 (5th Cir. 1953); Kahn, *supra* note 126, at 80 n.61; McHugh, *Collective Bargaining with Professionals in*

the right to representation by union officials during meetings and disciplinary sessions with employers.[145] The union is a persistent buffer between schools and employees. A more obvious adversarial relationship results.[146]

Employee relations are also likely to be strained by disputes between the schools and faculty and among the teachers over the status of church-trained staff in the collective bargaining unit. For example, two-thirds of the teachers in the Rhode Island Catholic schools described in *Lemon v. Kurtzman* were nuns or priests.[147] The Board has already decided a number of cases involving clerics' participation in the bargaining unit.[148] Naturally, the lay faculty want the clerics excluded because the latter do not have families and are not as likely to be aggressive on economic issues. The schools want the church-trained people included because they are more likely to represent the church's viewpoints within the union structure.

The NLRA would further affect the parochial schools by compelling them to disclose information in a number of circumstances. First, the schools would be subject to Board perusal of their financial data to determine jurisdictional status.[149] Secondly, under section 11 of the Act, the Board is entitled to access to "any evidence . . . that relates to any matter under investigation or in question."[150] Those are broadly-stated investigatory powers, and they have received an elastic judicial interpretation.[151] Thirdly, parties in

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Higher Education, 1971 WIS. L. REV. 55, 71-72. *See generally* GORMAN, *supra* note 14, at 503-06; 5 T. KHEEL, LABOR LAW §§ 19.07, 20.03(4)-(6) (1974). This aspect is discussed more fully in text accompanying notes 171-198 *infra*.

145. NLRB v. J. Weingarten, 420 U.S. 251 (1975); Texaco, Inc., Houston Producing Div., 168 N.L.R.B. 361 (1967).

146. Brown, *supra* note 18, at 270; *Michigan Project*, *supra* note 126, at 1498-1502. *See also* Wollett, *The Coming Revolution in Public School Management*, 67 MICH. L. REV. 1017, 1031-32 (1969).

147. 403 U.S. at 65.

148. St. Francis College, 224 N.L.R.B. 907, *enf. denied*, 562 F.2d 246 (3d Cir. 1977); Seton Hill College, 201 N.L.R.B. 1026 (1973).

149. NLRA § .9(c)(1), 29 U.S.C. § 159(c)(1) (1970); NLRB, Statements of Procedure, §§ 101.18(a), 101.4. *See* 2 T. KHEEL, *supra* note 144, at §§ 7.01(3), 7.02(4).

150. 29 U.S.C. § 161 (1970). Subsection (1) states:

> The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question.

Id. § 161(1).

For implementation of § 11, *see generally* 29 C.F.R. §§ 101-03 (1977). *Free Exercise*, *supra* note 8, at 661-62 n.157 , catalogues the relevant regulations.

151. *E.g.*, NLRB v. Wyman-Gordon, 394 U.S. 759 (1969). *See* 29 C.F.R. §§ 101-03 (1977);

Board proceedings can use the Board's compulsory process to extract a wide range of information from other interested parties.[152] Finally, in order to satisfy its duty to bargain in good faith, the parochial schools would be required to disclose any and all information relating to their bargaining positions.[153] If, for example, the schools contend that budget restraints preclude a sought-for salary increase, then they must open their books for inspection or be subjected to a Board finding of an unfair labor practice.[154]

With secular employers, such intrusions into records and motives are condoned as necessary to preserve peaceful industrial and economic conditions and to protect employees' rights. When the employer, however, is a religious institution that is not asserting itself in a commercial enterprise, the intrusion is more at odds with our conceptions of legitimate governmental inquiry.[155]

The cumulation of these effects would substantially inhibit the operations of parochial schools. The effects would produce a detrimental impact on the schools' budgets, on their efficiency, and on their autonomous character.

C. *Entanglement*

1. Character of the Institution

The propriety of government regulation in many instances can

Caulfield v. Hirsch, 95 L.R.R.M. 3164, 3173-74 (E.D. Pa. 1977); *Free Exercise Clause*, *supra* note 8, at 661-62 n.157.

152. NLRA § 11(1), 29 U.S.C. § 161(1):

> The Board, or any member thereof, shall upon application of any party to [Board] proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceedings or investigation requested in such application.

Subsections (2) and (3) provide enforcement mechanisms for the production of evidence and appearance of witnesses. 29 U.S.C. § 161(2)(3) (1970).

153. NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5); NLRB v. Acme Industrial Co., 385 U.S. 432 (1967); NLRB v. F.W. Woolworth Co., 352 U.S. 938 (1956); NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152-53 (1956); Boston-Herald-Traveler Corp. v. NLRB, 223 F.2d 58 (1st Cir. 1955); NLRB v. Item Co., 220 F.2d 956 (5th Cir. 1955); GORMAN, *supra* note 14, at 409-15; 4 T. KHEEL, *supra* note 144, § 16.04(8).

154. *E.g.*, NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); NLRB v. Bagal Bakers Council of Greater N.Y., 434 F.2d 884 (2d Cir. 1970); United Steelworkers of Am., Local 5571 v. NLRB, 401 F.2d 434 (D.C. Cir. 1968), *cert. denied*, 395 U.S. 946 (1969); NLRB v. Western Wirebound Box Co., 356 F.2d 88 (9th Cir. 1966).

155. The "effects" of the Board's investigatory and subpoena powers tie in closely with the church-government "resulting relationship" discussed in text accompanying notes 199-208 *infra*.

depend upon the religious character of the subject institution.[156] The determinative inquiry ascertains the degrees to which the institution and (at least in NLRB cases) the employees' unit are engaged in religious purposes and activities. Thus a church-supported hospital may legitimately be subjected to extensive regulation,[157] but a church charity that serves evangelistic ends may be beyond most public scrutiny.[158] Similarly, the NLRB can assert itself over carpenters and plumbers in a church publishing house,[159] but that same employer's religious writers and editors may be beyond the Board's reach.[160]

The Supreme Court has characterized parochial schools as permeated with religious instruction and purposes.[161] Value transference and inculcation are their *raison d' etre.*[162] For example, the Rhode Island church schools in *Lemon v. Kurtzman*[163] were located close to parish churches, thus facilitating convenient access for religious exercises in faith and morals. The schools contained many icons and paintings of religious import. Thirty minutes of each day were devoted to direct religious instruction, and there were also religiously-oriented extracurricular activities. Approximately two-thirds of the teachers in the schools were nuns. These and other facts prompted a district court finding that the schools constituted "an integral part of the religious mission of the Catholic Church," and "a powerful vehicle for transmitting the Catholic faith."[164] The Su-

156. *Establishment Clause, supra* note 93, at 1182-83; notes 105-106 and accompanying text *supra. Compare* Lemon v. Kurtzman, 403 U.S. 602 (1971) (government aid to parochial grade schools invalidated), *with* Tilton v. Richardson, 403 U.S. 672 (1971) (government aid to church-related colleges and universities sustained).

157. *See* Schulte, *Union Organization in Catholic Hospitals,* 21 CATH. LAW 332 (1975).

158. *Cf.* McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972); Lutheran Church Synod, 109 N.L.R.B. 859 (1954); *But see* Catholic Charities of Buffalo, 220 N.L.R.B. 9 (1975); Lutheran Welfare Services of Illinois, 216 N.L.R.B. No. 96 (1975).

159. First Church of Christ Scientist, 194 N.L.R.B. 1006 (1972).

160. *Compare* McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972) (Title VII does not reach church-minister relationship), *with* Marshall v. Pacific Union Conf. of Seventh Day Adventist, No. 75-3032-R (C.D. Calif. March 23, 1977) (FLSA equal pay provision applies to lay employees at church educational institutions). *But see* N.L.R.B. v. Associated Press, 301 U.S. 103 (1937).

161. Meek v. Pittenger, 421 U.S. at 366, 371; Tilton v. Richardson, 403 U.S. at 685-88; Lemon v. Kurtzman, 403 U.S. at 613-18; notes 105-106 and accompanying text *supra.*

162. Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1118-23 (7th Cir. 1977), *cert. granted,* 98 S. Ct. 1231 (1978).

163. 403 U.S. 602, 615 (1971). *See also* J. FICHTER, PAROCHIAL SCHOOL: A SOCIOLOGICAL STUDY 77-108 (1958); Giannella, *supra* note 113, at 574.

164. 403 U.S. at 616.

preme Court thus assumed in *Lemon,* as it has in each subsequent case involving elementary and secondary church schools, that those schools have, as a central purpose, the inculcation of religious values and beliefs and that purpose permeates the schools' operation and instruction.

The churches have explicitly expressed their goals. The Vatican, for example, has decreed that "the Church is bound to give those children of hers the kind of education through which their entire lives can be penetrated with the spirit of Christ."[165] In a 1972 pastoral letter, the American Bishops described the religious mission of Catholic schools in this country:[166]

> [T]he educational efforts of the church must encompass the twin purposes of personal sanctification and social reform in light of Christian values.
> Only in such a school can [students] experience learning and living fully integrated in the light of faith. The Catholic school 'strives to relate all human culture eventually to the news of salvation, so that the life of faith will illumine the knowledge which students gradually gain of the world, of life, and of mankind' . . . . [I]nstruction in religious trust and values is an integral part of the school program. It is not one more subject alongside the rest, but instead it is perceived and functions as the underlying reality in which the student's experiences of learning and living achieve their coherence and their deepest meaning.

Thus the churches try to attain their goals through the integration of religious values and secular subject matters—true understanding of the latter can be accomplished only by simultaneous and coordinated study of the former.[167] Church schools, therefore, strive to make the greatest use of "teachers who express an integrated approach to learning."[168] The teachers they employ are, at least without NLRB regulation, subject to the direction and discipline of the religious authorities.[169]

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165. *Declaration on Christian Education,* in THE DOCUMENTS OF VATICAN II 642-43 (1966).

166. TO TEACH AS JESUS DID 3, 29, *quoted in* Plaintiff's Brief in Support of Final Declaratory and Injunctive Relief 7-8, Caulfield v. Hirsch, No. 76-279 (E.D. Pa.).

167. Everson v. Board of Education, 330 U.S. 1, 46-47 (1947) (Rutledge, J., dissenting).

168. Pastoral Letter of American Bishops, TO TEACH AS JESUS DID 29 (1972).

169. Meek v. Pittenger, 421 U.S. 349, 371 (1975); Lemon v. Kurtzman, 403 U.S. 602, 617-18 (1971).

The NLRB has insisted that the schools perform primarily a secular function and that religious functions can be screened from the regulatory process.[170] This contention creates several difficult but pivotal issues concerning the nature of the Board's regulation and the church-state relationship that would result.

2. *Nature of the Aid or Inhibition*

The nature of the government's impact on the religiously associated institution can heavily influence the legitimacy of a regulatory scheme. As noted, general kinds of governmental aid, such as police and fire protection are not only permissible but in all probability are compelled by the religion clauses. The parochial cases draw the line when the state aid enters directly into the educational function within the schools. Placement of the dividing line, or "wall of separation," in regulatory matters will depend upon the degree to which the state inserts itself into the policy-making processes of the religious institution.

The NLRA enters into employers' affairs mainly through its imposition of a duty to bargain in good faith with duly certified unions.[171] To satisfy their duty, employers must be able to justify negotiation positions with reasonable and objective criteria, although they are not precluded from engaging in hard bargaining.[172] The duty extends to bargaining over any issues relating to "wages, hours, and other terms and conditions of employment."[173] The language, especially terms and conditions of employment, has been given an expansive construction.[174] If either side raises any of these "mandatory" subjects, then the other side must discuss them in

170. *See* Catholic Bishop of Chicago v. NLRB, 559 F.2d at 1115-16.

171. NLRA, §§ 8(a)(5), 29 U.S.C. §§ 8(a)(5) (1970); Fireboard Paper Products v. NLRB, 379 U.S. 203 (1964). *See generally* GORMAN, *supra* note 14, at 374-539; 4 T. KHEEL, *supra* note 144 §§ 16.01-.04.

172. NLRA § 8(d), 29 U.S.C. § 158(d); H.K. Porter Co. v. NLRB, 397 U.S. 99, 106 (1970).

173. NLRA § 8(d), 29 U.S.C. § 158(d). *See also id.* § 9(a), 29 U.S.C. § 159(a).

174. *E.g.*, NLRB v. Fireboard Paper Products Corp., 379 U.S. 203 (1964) (subcontracting); I.L.G.W.U. v. NLRB, 463 F.2d 907 (D.C. Cir. 1972) (relocation); Ozark Trailers, Inc., 161 N.L.R.B. 561 (1966) (partial shutdown); Houston Chapter, Associated Gen'l. Contr. of Am., 143 N.L.R.B. 409 (1963), *enf'd*, 349 F.2d 449 (5th Cir. 1965) (hiring practices); United States Gypsum Co., 94 N.L.R.B. 112, *amended*, 97 N.L.R.B. 889 (1951), *modified on other grounds*, 206 F.2d 410 (5th Cir. 1953) (timing and sequence of layoffs); Menard, *Exploding Representation Areas: Colleges and Universities*, 17 B.C. IND. & COM. L. REV. 931, 977 (1976). *See generally* GORMAN, *supra* note 14, at 503-23; 5 T. KHEEL, *supra* note 144, §§ 19.01-20.06.

good faith, and unilateral decisions on the subjects are precluded.[175] Failure to bargain on such issues, if they are raised, is an unfair labor practice.[176] The employer or union may also choose to negotiate "permissive" issues, which are not subject to Board enforcement powers.[177] The Board and courts have, however, prohibited on statutory and general policy grounds certain demands and subjects from being made a part of labor negotiations.[178]

NLRB and judicial enforcement of the duty to bargain in good faith has cost employers much of their ability to control many policy and management matters. In the school setting, for example, teachers and union officials can force the school administration to consult with them and to consider their input on a wide variety of policy matters.[179] If the school does not comply with such a request, the employees can strike and can file an unfair labor practice complaint. The "enforcer" then is the NLRB; it can intercede and compel bargaining.[180] The unions will naturally assert themselves as much as possible and acquire as much control as they can. Board enforcement powers facilitate that. On the strength of these realities, one observer of school-faculty relations has projected the typical progression of subject matters in collective bargaining for schools:[181]

> Once a bargaining agent has the weight of statutory certification behind it, a familiar process comes into play. First, the matter of salaries is linked to the matter of workload; workload is then related directly to class size, class size to range of offerings to curricular policy. Dispute over class size may also lead to bargaining over admissions policies.

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175. NLRA §§ 8(a)(3) & (d), 29 U.S.C. §§ 158(a)(3) & (d); GORMAN, *supra* note 14, at 496.

176. NLRA, §§ 8(a)(3) & (d), 29 U.S.C. §§ 158(a)(3) & (d); GORMAN, *supra* note 14, at 496; 5 T. KHEEL, *supra* note 144, § 22.03.

177. GORMAN, *supra* note 14, at 496-98, 523-29; 5 T. KHEEL, *supra* note 144, §§ 18.02, 21.01.

178. *Id.* § 21.02.

179. Kahn, *supra* note 126, at 80 & n.61. *See generally* Klaus, *The Evolution of a Collective Bargaining Relationship in Public Education: New York City's Changing Seven-Year History*, 67 MICH. L. REV. 1033 (1969); Note, *Teacher Collective Bargaining—Who Runs the Schools?*, 2 FORDHAM URB. L.J. 505 (1974) [hereinafter cited as *Teacher Collective Bargaining*]; notes 181-185 and accompanying text *infra*.

180. GORMAN, *supra* note 14, at 496-98; 5 T. KHEEL, *supra* note 144, §§ 18.02, 19.01.

181. Brown, *supra* note 134, at 1075. The text and notes that follow support Brown's assessment. *See*, especially the authorities cited and quoted in note 184 *infra*.

This development reflects what has occurred in a very short time in private nonsectarian schools, especially universities, and in public elementary and secondary schools.[182] Actually, the union bargainers have not even needed all of the steps quoted above, and have in some circumstances argued very early in the collective bargaining relationship that certain matters of academic policy are "terms and conditions of employment."[183] Teachers have thus been able to force bargaining over curriculum choices, selection of texts, the substance and variety of special educational programs, treatment of problem pupils, class size, and school calendar.[184] These subjects, though in

182. Klaus, *supra* note 179, provides a graphic illustration of the progression of bargaining subjects in public school negotiations. For other treatments of collective bargaining in the public school setting, see Kahn, *supra* note 126, at 80 and n.61; *Teacher Collective Bargaining, supra* note 179; Comment, 21 VILL. L. REV. 777 (1976). On the developments in higher education's expanded bargaining, *see* Brown, *supra* note 18, at 320-23; McHugh, *Collective Bargaining with Professionals in Higher Education* 1971 WIS. L. REV. 55, 71-73.

183. *See* Klaus, *supra* note 179, especially at 1042-46.

184. The expansiveness of educational policy areas subject to collective bargaining is becoming well documented. For example, in a 1975 Pennsylvania case, Pennsylvania Labor Relations Bd. v. State College Area School Dist., 461 Pa. 494, 337 A.2d 262 (1975), teachers sought bargaining on a list of subjects that included questions of maximum class size, school calendar, allocation of teachers' time while at school, and parent conferences. Comment, 21 VILL. L. REV. 777, 778 n.2 (1976). The New York City experience has revealed teachers' insistence on bargaining over class size, teacher recruitment, improvement of "difficult" schools, length of school year, problems with "disruptive" pupils, and experimental educational programs. Klaus, *supra* note 179. Elsewhere, boards have been forced to negotiate with teachers over standards and procedures for tenure, employment of specialists (psychologists, speech therapists, remedial reading teachers), employment of staff for special instruction in art and music and for non English speaking students, design of, and equipment for, new or remodeled school facilities, curriculum, new program development, priorities setting, textbook selection, election of department chairman, promotions, and discipline. Wollett, *supra* note 146, at 1022-28. *See also* Jascourt, Metzler, Gerrard, & Dunlop, *Should Methods to Deal with Student Discipline Be Negotiated with Teacher Organizations?*, 6 J.L. & EDUC. 63 (1977).

There are some who have argued that, at least in higher education, the faculty has a legitimate interest in all academic issues, and that practically every expenditure and decision in the operation and maintenance of an educational institution is justified on the grounds of its contribution to a better education. Thus, there is little, if anything, beyond the scope of faculty participation. Brown, *supra* note 18, at 320-24. Such logic has led to an expansive scope of bargaining in many education institutions. *Id.* at 325-26; Kahn, *supra* note 126, at 80-81; McHugh, *supra* note 182, at 71-73. The president of the bargaining representative for the faculty of the State University of New York at one point included the following subjects (among other) in an upcoming negotiation: academic calendar, tenure policies, campus affairs, admissions, selection of all administrators—including the chancellor and deans, central faculty authority, master-plan formulation, educational policy governing entire university, establishment of new campuses, and intercollege agreements. *Id.* at 72 n.89. Mr. McHugh summarized the developments of this "shared authority" through 1971:

Experience so far suggests that faculty will introduce into the collective bargaining

varying degree, are all intimately related with educational policy and value transference. The conflict is exacerbated in parochial schools, where religion and secular instruction are integrated. Curriculum, text, and calendar decisions, for example, are premised at least partially on sectarian rationales. Thus, in forcing parochial schools to bargain on matters of curriculum and texts, the Board is forcing the schools to negotiate on religiously-charged topics.

In negotiations with public schools and private universities, teachers have thus far shown great interest in securing academic freedom.[185] In parochial schools, however, "academic freedom" raises difficult questions of whose freedom should control; for balanced against the teachers' rights are highly valued first admendment interests of parents and churches.[186] Distinguishing the religious from the secular in matters of academic freedom can be especially complex.[187] Any teacher-to-student value transference that is not totally consistent with the church's philosophy could raise a religious conflict. Whose freedom should prevail—the sponsoring church's or the teacher's?[188] The manner in which the hundred years war or man's origin is explained, the selection of readings for a modern novel course, the manner in which those books are presented and analyzed, and the inclusion or exclusion of sex education in a health course are some examples of the kind of instructional decisions that persistently evoke both academic freedom and reli-

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process matters involving the basic policy of the academic institution and the authority of its governing board and other levels of managerial authority . . . . [T]he concept of negotiable issues covers everything from admissions, class size, academic calendar, procedures for budget formulation, participation in physical plant planning and expansion, allocation of resources, to athletic policy and procedures for selection of administrators and department chairmen. This . . . includes a wider spectrum of matters than customarily associated with industry or public employment bargaining.

Id. at 72.

185. Menard, *supra* note 174, at 981-84. *See also* authorities cited in note 184 *supra.*

186. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); State of Ohio v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).

187. Meek v. Pittenger, 421 U.S. 349, 366, 371 (1975); Lemon v. Kurtzman, 403 U.S. 602 (1971); notes 99-101, 108-109 and accompanying text *supra;* text accompanying notes 209-236 *infra.*

188. The often conflicting rights of government, parents, school administrators, teachers, and students make academic freedom a very difficult question in any circumstance; *see generally,* Van Alstyne, *The Constitutional Rights of Teachers and Professors,* 1970 DUKE L.J. 841; *Developments in the Law—Academic Freedom,* 81 HARV. L. REV. 1045 (1968); but it is especially difficult in the parochial school setting, with the added dimension of church and parental religious rights.

gious values.[189] Can the NLRB force churches to negotiate and to negotiate in good faith over the right to control such matters?

When presented with charges against a parochial employer for failure to bargain, the Board's choices are:

1. To compel the church schools to bargain, and perhaps compromise, on questions the churches may deem religious;
2. To decide after investigation and, possibly, hearings and appeals, that the case does involve religious issues and, therefore, abstain or refuse to order bargaining; or
3. To create through rulemaking broad exceptions for regulation of parochial schools.[190]

Each one of these alternatives has undesirable first amendment consequences. The first two require substantial government contact with church schools and government scrutiny of the church's religious beliefs and values and of the school officials' motives. The process alone could have a chilling effect on the schools' religious freedom:[191] they may frequently decide that litigating through the

189. The public schools, which are ostensibly neutral regarding both religion and values, have experienced the clash of values in disputes over decisions of this type. *E.g.*, Acanfora v. Board of Educ. of Montgomery County, 491 F.2d 498 (4th Cir. 1974) (teacher could not be dismissed for his activities in gay rights movement, although he could be fired for not listing membership in gay rights group on his employment application in response to a legitimate question); Presidents' Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir. 1972) (school board could order removal of novel, *Down These Mean Streets*, which explicitly depicted ghetto life); Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970) (dismissal of teacher for assigning a particular Kurt Vonnegut short story violated teacher's first amendment rights); Parker v. Board of Educ., 237 F. Supp. 222 (D. Md. 1965) (failure to rehire probationary teacher did not violate his constitutional rights, even if done in response to teacher's assignment of *Brave New World*), *aff'd on other grounds*, 348 F.2d 464 (4th Cir. 1965); Todd v. Rochester, 41 Mich. App. 320, 200 N.W.2d 90 (1972) (trial court erred in ordering removal of *Slaughterhouse 5* from public school library and curriculum on theory that the novel violated establishment clause and was obscene and valueless); Rosenberg v. Board of Educ.,196 Misc. 542, 92 N.Y.S.2d 344 (Sup. Ct. 1949) (judicial relief is unavailable for plaintiffs seeking removal of *Oliver Twist* and *Merchant of Venice* from public schools because of allegedly anti-Semitic characters in the books). *See generally* O'Neil, *Libraries, Librarians and First Amendment Freedoms*, 4 HUM. RTS. L. REV. 295 (1975); O'Neil, *Libraries, Liberty and the First Amendment*, 42 U. CINN. L. REV. 209 (1973); Seitz, *Supervision of Public Elementary and Secondary School Pupils Through State Control Over Curriculum and Textbook Selection*, 20 L. & CONTEMP. PROB. 104 (1955); *Michigan Special Project*, *supra* note 126; Note, *School Boards, Schoolbooks, and the Freedom to Learn*, 59 YALE L.J. 928 (1950). *See also* authorities cited in notes 4, 38, 40, 186 & 188 *supra*.

190. The Board does, of course, have one other choice—to abstain completely.

191. Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1124 (7th Cir. 1977), *cert. granted*, 98 S. Ct. 1231 (1978); Caulfield v. Hirsch, 95 L.R.R.M. 3164, 3170-71 (E.D. Pa. No. 76-279 1977); *Free Exercise Clause*, *supra* note 8, at 660-62.

NLRB is too costly and upsetting and will thus agree to bargain and compromise policy questions. Moreover, the Board would grossly offend first amendment values if it wrongly concluded that a given matter is not "religious."

Rulemaking is also an undesirable alternative. Numerous exceptions or special classifications for church schools would require many distinctions to be drawn along religious lines. That would likely provoke more and greater political and policy disruptions than would a total exemption for parochial schools.[192] Moreover, sifting religiously sensitive elements from parochial elementary and secondary education is a very difficult, if not impossible, undertaking.[193] The risks of underinclusion and overinclusion would be foreboding.[194] Rulemaking would also be likely to generate administrative and judicial appeals, thereby requiring the Board and the courts to rule on the good faith of churches and the scope of their religious beliefs.

Subjection to Board regulation and the concomitant duty to bargain in good faith threaten parochial school officials' abilities to maintain lines of authority and control over faculty.[195] Church schools will have to deal with unions over issues of tenure and promotion, grounds and procedures for discipline and termination of teachers, and, quite possibly, even hiring and recruiting of faculty. The church schools may be forced to negotiate over their right to make individual personnel decisions on the basis of a teacher's willingness and ability to convey religious values, or on the basis of a teachers's morality.

The Board would face a predicament here. If it ordered the school and union to bargain over the basis for personnel decisions, then the school may be forced by the pressures of negotiation either to compromise its religious principles or to prevail on the religiously impor-

192. Gillette v. United States, 401 U.S. 437, 450 (1971); United States v. Seegar, 380 U.S. 163 (1965). *See also* New York v. Cathedral Academy, 434 U.S. 125 (1977); Ballard v. United States, 322 U.S. 78 (1944).

193. *See* notes 99-101, 108-109, and 187 and accompanying text *supra.*

194. Such classifications present classic challenges under both the equal protection and establishment clauses. *See* Gillette v. United States, 401 U.S. at 449 n.14; Walz v. Tax Comm'n, 397 U.S. at 696 (Harlan, J., concurring); Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949). *Compare* McDaniel v. Paty, 98 S.Ct. at 1333-36 (Brennan, J., concurring) (prohibition against clerics serving as legislators violates establishment clause); *with id.* at 1322 (White, J., concurring) (the prohibition violates equal protection clause).

195. *See* notes 182-184 *supra.*

tant points by trading some economic or other benefit to the union.[196] The latter would place still another financial burden on the school and on the parents for sectarian education. If the Board treated the parochial school like any other private school, then religious values could neither motivate dealings with lay personnel nor be incorporated into the collective bargaining agreement. Finally, if the Board created a special exception for church schools and made religious considerations a "permissive" topic of negotiation, then, once again, the schools would find that, to preserve their religious concerns, they would have to compromise on other issues. Even if the Board recognized that the schools had an inherent right to make personnel decisions on the basis of religious motivations, employees could contend that decisions made against them were not so motivated and that anti-union bias or some other illicit reason provoked the school to act.[197] Then the Board, on an unfair labor practice charge, could find itself scrutinizing the motives of the church school officials to determine whether they were sincerely religious.[198]

The nature of labor regulation in the United States would, therefore, thrust government deeply into the conduct and religious affairs of parochial schools. Moreover, the intrusion would occur at the most sensitive points—on decisions of policy-making and personnel management. Such regulation effects a secularization of the schools' religious values and missions and results in an unacceptable church-government relationship.

3. *Resulting Realtionship*

For most employers, NLRA coverage means ongoing and frequent contact with the National Labor Relations Board. In the case of parochial schools, the Board has pledged vigilance in separating the

196. The government's backing of the NLRB does increase the union's negotiating power. *See* Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1123-24 (7th Cir. 1977), *cert. granted,* 98 S. Ct. 1231 (1978). Indeed, reinforcement of unions' powers as employees' representatives was one of the Congressional purposes in enacting the NLRA. NLRA § 1, 29 U.S.C. § 151 (1970).

197. The Seventh Circuit, in its opinion in *Catholic Bishop,* cited several instances in which a parochial employer had dismissed an employee for policy reasons, yet was accused of an unfair labor practice by the discharged employee. 559 F.2d at 1125-26. The charges were eventually dismissed, but only after Board investigation and review. In one of the cases, 3 days of testimony and 531 pages of transcript were required to reach a disposition. *Id.* at 1126.

198. *See* text accompanying notes 209-236 *infra* for a discussion of the constitutional implications of such scrutiny. *See* New York v. Cathedral Academy, 434 U.S. 125 (1977); Ballard v. United States, 322 U.S. 78 (1944); *id.* at 92-95 (Jackson, J., dissenting).

sectarian from the secular,[199] but there is a substantial doubt whether that distinction can be made with any degree of precision or fairness. Furthermore, the mere making of that distinction and the potential frequency of NLRB proceedings create entanglement problems.

a. NLRB Proceedings

Essentially, there are two kinds of NLRB cases: one examines charges of unfair labor practices, and the other concerns union certifications and decertifications. In each case, a preliminary determination must be made that both the employer and the industry are engaged in interstate commerce and meet the Board's jurisdictional requirements. The Act's grant of investigatory powers to the Board extends to all proceedings and issues. The Board may also seek federal court assistance in certain circumstances. Review by a federal court of appeals is available for each decision of the NLRB and the district court.

Section 8 of the NLRA defines "employer" and "union unfair labor practices," which address all phases of labor organization, bargaining, and the use of economic pressures.[200] Most importantly for present purposes, employers are proscribed from discriminating in any way against employees for union or organizing activities, and are required to bargain in good faith with the duly certified collective bargaining representative for the employees. Unions also have a duty to bargain, and their organizational and strike activities have certain fair play restrictions.

Unfair labor practice cases are initiated by a complaint filed by the aggrieved party with the appropriate NLRB regional office.[201] That office then investigates the allegations and decides whether a

199. *See* Catholic Bishop of Chicago v. NLRB, 559 F.2d at 1115, 1125.

200. 29 U.S.C. § 158. *See generally* GORMAN, *supra* note 14, at 93-366.

201. More elaborate descriptions of the procedures in unfair labor practice cases can be found in GORMAN, *supra* note 14, at 7-15, 93-131; T. KAMMHOLZ & K. MCGUINESS, PRACTICE AND PROCEDURE BEFORE THE NATIONAL LABOR RELATIONS BOARD 44-91 (1966); T. KHEEL, *supra* note 144, §§ 7.02-.05.

Of course, before it can exercise its regulatory powers in a given case, the Board must decide whether the employer is within the agency's jurisdictional guidelines. This is primarily an economic determination that devolves from the interstate commerce clause origins of the Board's powers to regulate employment relations. To satisfy the Board's jurisdictional standards, parochial school employer bargaining units must have an annual operating budget at least of $1,000,000. 29 C.F.R. § 103 (1977). To make its jurisdictional determination, the Board must therefore inquire into the financial data of the employer.

charge should be issued. If it decides against a charge, then the filing party may register an appeal with the NLRB's General Counsel in Washington. If the regional office or General Counsel issues a charge, then the Counsel's office assumes a prosecutorial role; and, if the case cannot be settled, it is referred to an Administrative Law Judge for a full hearing. His decision is appealable to the five-member board, and from there a case can be appealed to a federal circuit court.

The NLRB is empowered by the Act to petition a federal district court for appropriate temporary injunctive relief in cases of ongoing unfair labor practices.[202] The Act thereby attempts to aid the investigation of unfair practice charges and to prevent irreparable harm threatened by such unlawful activity.[203]

The certification process is initiated by a petition filed with a regional NLRB office.[204] To get an election, the union must show a substantial interest among the employees. This may be accomplished by submitting employee-signed pledge cards. The NLRB is charged with assuring the substantiality of the employee interest and with maintaining the purity of the secret ballot election. If a majority of employees do vote for the union, the Board certifies it as their collective bargaining agent and no further elections can be held for at least one year.[205] After the expiration of that time, the certification will remain in effect unless challenged by the employer, a rival union, or the employees.

For each proceeding and each potential issue, the Board is blessed with broad investigatory powers. They give the agency the right to inspect and to copy any evidence "that relates to any matter under investigation or in question."[206] The powers have been liberally construed to maximize fact-finding efficiency and accuracy.[207]

The Board's proceedings and powers thus precipitate a persistent and extensive interaction among the Board, the employer, and the

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202. NLRA, § 10(j), 29 U.S.C. § 160(j) (1970).

203. *E.g.*, NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951).

204. Elaboration on procedures in representation cases can be found in GORMAN, *supra* note 14, at 40-65. KAMMHOLZ & MCGUINESS, *supra* note 201, at 9-41; T. KHEEL, *supra* note 144, § 7.01.

205. NLRA, § 9(e)(2), 29 U.S.C. § 159(e)(2) (1970). Under the "Contract-Bar Rule," a union's certification cannot, with certain exceptions, be challenged during the term of a collective bargaining agreement (having a fixed termination date), up to a three-year maximum. General Cable Corp., 139 N.L.R.B. 1123 (1962). *See* GORMAN, *supra* note 14, at 54-59.

206. NLRA, § 11, 29 U.S.C. § 161. *See* notes 150-152 and accompanying text *supra*.

207. *See* authorities cited in notes 150-151 *supra*.

union. There are few aspects of the employment process that are not, at some point, subject to some NLRB scrutiny. As shown in the preceding section, the duty to bargain in good faith can require employers to negotiate over many matters that are laced with management and policy considerations. Unfair labor practice cases cover a diverse scope: employer hiring practices, job terminations, organizing and anti-organizing activities, the bargaining process, economic warfare, and even partial plant closings.[208] The certification and election process may often involve the Board deeply in the relations between employer and employees.

b. Intrusive Quality of NLRB Procedures

The Board has contended that such expansive regulation is permissible because the secular functions and activities can largely be ferreted from the school's religious components, and because the state interests justify whatever infringement does occur.[209] Subsequent discussion addresses the sufficiency of the state interest.[210] Earlier discussion has described the difficulties inherent in distinguishing between sectarian and secular activities and substance.[211] Even assuming the legitimacy of the Board's contentions, a significant question remains concerning the constitutional propriety of a regulatory agency's continuous scrutiny of the extent to which the activities of a church-affiliated institution are "religious" or "secular." In labor relations, the scrutiny can be pervasive. For example, the Board would have to distinguish between religious and secular in determining mandatory and permissive issues for the bargaining process,[212] in reviewing terminations allegedly based on religious policy grounds but challenged as an unfair labor practice,[213] and in defining the appropriate contours of the employees' collective bargaining unit.[214]

These are the kinds of intrusive govermental decisions about

208. NLRA §§ 7-8(a)(b), 29 U.S.C. §§ 151-58(a)(b); GORMAN, *supra* note 14, at 132-539; 3 T. KHEEL, *supra* note 144, §§ 10.01-12.05; authorities cited in note 174 *supra*.

209. Catholic Bishop of Chicago v. NLRB, 559 F.2d at 1115, 1125; Cardinal Timothy Manning, 223 N.L.R.B. 1218 (1976).

210. Text accompanying notes 237-249 *infra*.

211. Notes 99-101, 108-109 , and 187 and accompanying text *supra*. *See also* notes 231-235 and accompanying text *infra*.

212. Notes 171-185 and accompanying text *supra*.

213. Note 197 and accompanying text *supra*.

214. Notes 147-148 and accompanying text *supra*.

which the Court was concerned in *Walz*. The property-tax exemption for churches was sustained because its alternative would engage agencies and courts in a series of official actions involving religious bodies, and each action would present a challenge to neutrality. Tax collections, assessments, notices to foreclose, negotiations, and foreclosures would cumulatively threaten to become unconstitutional entanglement.[215]

In reviewing judicial resolution of church disputes, the Supreme Court has expressed many of the *Walz* concerns about official decision-making in matters of religion and beliefs. The Court has disallowed—at least in the absence of fraud or collusion—judicial involvement in cases that require any scrutiny of a church's law or beliefs, especially when the church hierarchy has already ruled on the matter.[216] Judicial power, therefore, cannot be used to review even the "arbitrariness" of a bishop's defrocking or a diocesan restructuring within a church.[217] Courts cannot settle property disputes that turn on an interpretation of a church's adherence to religious tenets.[218] Even when enforcing legislation that was enacted to effect an important state interest, courts cannot intercede in an hierarchical church dispute.[219]

Each of these decisions restricting judicial power involved some intrusion into church governance and into religious beliefs and practices.[220] In such cases, "the hazards are ever present in inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern."[221] The intrusion into church processes and the mere threat of compromising religious values by civil enforcement are sufficient to justify staying judicial powers. That the church has acted arbitrarily, or without "due process," or even without strict adherence to its own eccle-

215. 397 U.S. at 674-75.

216. *E.g.*, Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyt. Church, 393 U.S. 440 (1969). *See also* Gonzalez v. Archbishop, 280 U.S. 1 (1929); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871). *See generally* Sampen, *Civil Courts, Church Property, and Neutral Principles: A Dissenting View*, 1975 U. ILL. L.F. 543; Comment, 1977 WIS. L. REV. 904.

217. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

218. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyt. Church, 393 U.S. 440 (1969). *See also* Maryland and Virginia Eldership of the Churches of God v. Church of God at Sherpsburg, 396 U.S. 367 (1970).

219. Kedroff v. St. Nicholas Cahtedral, 344 U.S. 94 (1952).

220. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyt. Church, 393 U.S. at 449.

221. *Id.*

siastical procedurees, does not raise the bar.[222]

The kind of governmental decisions being made can be more significant than the quantity of decisions. In *Gillette v. United States,*[223] the Court rejected a first amendment argument that objectors to a particular war must be provided with a draft exemption similar to that provided to those who object to all wars. Congress could, so the Supreme Court held, draw the line where it did in order, among other things, to avoid more frequent and persistent examination of the sincerity of draftees' beliefs. The state should attempt to minimize, if possible, "the potential for state involvement in determining the character of persons' beliefs and affiliations, thus 'entangl[ing] government in difficult classifications of what is or is not religious,' . . . ."[224] In an earlier decision, *Welsh v. United States,*[225] the Court used that reasoning to construe, somewhat tenuously, the conscientious objector provision to include those whose repugnance to war was premised on nonreligious or undefined theistic beliefs. Had the inclusion not been made in *Welsh,* the government would have been forced to make difficult distinctions between beliefs. Such official intrusion into matters of conscience may have made the exemption unconstitutional.

NLRB involvement in parochial school affairs threatens many of the same problems as the Court encountered in the cases of selective service and of internal church disputes. Many of the controversies that are likely to arise in labor regulation have undertones of religious policy. Teacher terminations for failing to adhere to, or to instruct adequately in church doctrine, or decisions about the appropriate percentages for clerics and lay instructors are, for example, situations involving church policy yet likely to spark union reactions and NLRB litigation.[226]

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222. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. at 711-720. In the Catholic schools, for example, many of the major policy questions are decided at upper levels of the church hierarchy and then handed down through the ranks. NLRB review could mean governmental review of the sufficiency of the hierarchy's reasoning in disputed matters, and possibly the necessity for choosing between the local union's (and at times the parish's) contentions and those of the Diocese or Bishop or Cardinal. The Board could thereby become entangled in church business.

223. 401 U.S. 437 (1971).

224. *Id.* at 457, *in part* quoting Justice Harlan's *Walz* concurrence, 397 U.S. at 698-99. *See also* Ballard v. United States, 322 U.S. 78 (1944).

225. 398 U.S. 333 (1970).

226. *See id.* at 344-45, 356-61 (Harlan, J., concurring) (limitation on conscientious objector status to those who object on established religious grounds violates first amendment); United States v. Seeger, 380 U.S. 163 (1965). *See* notes 147-148, 197 and accompanying text *supra.*

The Court has recently reiterated its disfavor with the use of state dispute-settlement processes to resolve sensitive religious issues. In *State of New York v. Cathedral Academy,*[227] the Court considered a statute that authorized reimbursement to sectarian schools for record keeping and testing services incurred prior to an earlier federal court decision invalidating such payments. The school seeking reimbursement argued that the New York Court of Appeals had allowed the reimbursement and had sustained the statute by construing it "to require a detailed audit in the state Court of Claims to establish whether or not the amounts claimed for mandated services constitute a furtherance of the religious purposes of the claimant."[228] The construction not only failed to cure the law's previously identified defect, but also created a fatal one of its own: "[T]his sort of detailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments."[229] The plan had the petitioning schools trying to prove the nonreligious content of their instruction while the state took the opposite side of that sensitive issue. The plan would cast the Court of Claims as the arbiter in an essentially religious dispute. "The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once."[230]

In NLRB cases, the issue is the same: the school and government have merely swapped sides in the argument. Both the offensive character of the dispute and the degree of objectionable state intrusion remain excessive.

The Court has persistently noted the undesirable, as well as futile, nature of state attempts to separate the secular from the religious. Some of the difficulties have been discussed above in the context of the collective bargaining process and mandatory bargaining subjects.[231] The establishment clause decisions concerning public aid for teachers' salaries have also illustrated the intractable

227. 434 U.S. 125 (1977).

228. *Id.* at 131-32, *quoting* Cathedral Academy v. State, 47 App. Div. 2d 390, 397, 366 N.Y.S. 2d 900, 906 (1975).

229. 434 U.S. at 132.

230. *Id.* at 133, *citing with "cf.",* Presbyterian Church v. Mary Elizabeth Blue Hall Memorial Presbyt. Church, 393 U.S. 440 (1969).

231. Notes 171-185 and accompanying text *supra.*

problems in making secular-religious distinctions.[232] It would "ignore reality to separate secular education functions from the predominantly religious role" of parochial schools.[233] The schools have "inextricably intertwined" religious and secular functions.[234] Moreover, the prophylactics necessary to insure that government neither aids nor inhibits religious ideology create an intolerable degree of entanglement.[235]

The NLRB must face this dilemma, especially in regulating organizations of teachers. The difficulty of ferreting the religious from the secular is likely to be insurmountable; but in making a serious effort to do so effectively, the Board will need to thrust itself deeply into the churches' and synagogues' conduct of their schools as well as the motives of their officers. Thus, even if merely addressing the religious/secular question is not necessarily unconstitutional, the efforts needed to resolve it frequently will be.[236] In NLRB regulation, the question is likely to be recurrent and complex; that potential precludes the Board from constitutionally asserting itself into parochial education.

D. *Governmental Interests*

The state may be able to justify intrusions on first amendment religious interests by showing that its actions are necessary to advance a substantial countervailing interest. Certainly, this balancing approach is appropriate in most free exercise cases. There is, however, considerable doubt whether *any* state interest can justify excessive entanglement with religious institutions. The Supreme Court has yet to find that such a relationship can be justified by a weightier state interest.[237] Indeed in the parochial decisions, the

232. Meek v. Pittenger, 421 U.S. 349 (1975); Lemon v. Kurtzman, 403 U.S. 602 (1971); notes 108-109 and accompanying text *supra*.

233. Meek v. Pittenger, 421 U.S. at 365.

234. *Id.* at 366.

235. *Id.* at 370-71. *See also* Lemon v. Kurtzman, 403 U.S. at 618-20.

236. State of New York v. Cathedral Academy, 434 U.S. 125 (1977); Gillette v. United States, 401 U.S. 437 (1971); Welsh v. United States, 398 U.S. 333 (1970).

237. *See Establishment Clause*, *supra* note 28, at 1174-78. Of course, the Court may, in effect, balance *sub silentio* when it determines whether some particular entanglement is "excessive," and thus violative of the first amendment. The cases, however, do not appear to substantiate that. *E.g.*, *compare* Wolman v. Walter, 433 U.S. at 241-48 (publicly supported diagnostic, therapeutic, guidance and remedial services by public counselor provided in neutral sites for parochial school children do not create excessive entanglement) *with id.* at 252-55 (publicly provided field trips for parochial school children would create excessive entanglement) *and* Meek v. Pittenger, 421 U.S. at 371 (publicly supported remedial and therapeutic

Court has acknowledged that the church schools are in grave financial circumstances and that their perpetuation is essential for the states to avoid a crisis in the public schools.[238] Fearing, however, that legislation in aid of parochial schools created untoward entanglement, the Court has unhesitatingly invalidated it.

The ensuing discussion assumes, however, that the free exercise character of the church schools' objections to government regulation requires a reviewing court to balance the competing state and free exercise interests. In so doing, the court should be careful to weigh the state interest only to the extent it applies to the affected institutions, less any mitigations from available alternatives that would not be so restrictive on the religious rights.[239]

In the context of labor regulation, the federal government wants to prevent labor unrest, preserve the free flow of commerce, and secure employees' rights.[240] The Board has argued that these are paramount and legitimate purposes.[241] Indeed they are. When the affected employer, however, is a religious institution, then those interests should be valued only to the extent that similar religious institutions can threaten the state interests. Parochial schools control, collectively, a major segment of elementary and secondary education, and they do engage in a substantial amount of commerce. Nevertheless, the schools are neither that large, nor that important a cog in our commercial-industrial chain, that their labor problems could cause serious disruption; nor do the schools have a history of serious labor problems. The NLRB's primary interest in regulating parochial schools, therefore, lies in protecting the organizational rights of the schools' employees.

Of course, the employees can still unionize without the NLRB's oversight. Indeed, many parochial schools have permitted their teachers to organize.[242] If the religious schools are to compete with the public schools for quality lay teachers, they must keep pace in

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counseling given inside the parochial schools created too great a risk for excessive entanglement).

238. Lemon v. Kurtzman, 403 U.S. at 624-25. *See also* Meek v. Pittenger, 421 U.S. at 386-87; *id.* at 386-87 (Burger, C.J., concurring in judgment and dissenting); PEARL v. Nyquist, 413 U.S. at 763-64; *id* at 817-19 (White, J., dissenting).

239. *See* authorities cited in note 81 *supra*. *See also* Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 543-44 (1977).

240. NLRA, § 1, 29 U.S.C. § 151.

241. Cardinal Timothy Manning, 223 N.L.R.B. 1218 (1976); First Church of Christ, Scientist in Boston, 194 N.L.R.B. 1006, 1007-08 (1972).

242. *See, e.g., Free Exercise Clause, supra* note 8, at 646-47.

employee relations and benefits. That will frequently mean unions. The schools' objection is not so much with unions, as it is with government compulsion and its attendant costs in money, effort, and policy sacrifices.[243]

The Board has contended that the resolution of conflicting governmental and religious interests is controlled by several recent appellate and administrative precedents.[244] Those decisions sustained the Board's jurisdictional assertions over lay employers who had claimed that compliance with the NLRA violated their religious beliefs and, thus, their free exercise rights. The cases may well have been correctly decided, yet they do not control parochial school challenges to Board regulation because the interests on both sides of the balance are quite different.

The Board's concerns are weightier when the employer is *not* a religious institution. To allow exceptions for lay employers claiming a religious objection would invite spurious claims. A total exemption could threaten the effectiveness of the laws by providing a loophole across the breadth of employers. Moreover, Board inquiries into the nature and sincerity of the claimed religious beliefs would raise serious first amendment problems. Finally, traditional notions of "religious" do not encompass theoretical objections to regulation by the NLRB; such protests smack more of economics than theology.[245]

More importantly, though, when the employer is a religious institution, like a parochial school, the free exercise interests are considerably more serious and complex.[246] In such cases, the affront to the first amendment lies not only in a conflict between principles, but also in the inhibitory effect and entanglement engendered by the government regulation and by the intrusion of government into religious decision-making.[247] The claims of established religious organi-

243. *See, e.g.*, Hubbell, *supra* note 3, at 341. *See also* Schulte, *supra* note 157, at 334-35.

244. Cap Santa Vue v. NLRB, 424 F.2d 883 (D.C. Cir. 1970); Good Foods Corp., 195 N.L.R.B. 418 (1972), *enforced*, 492 F.2d 1302 (7th Cir. 1974); Western Meat Packers, Inc., 148 N.L.R.B. 444 (1964), *enf. denied on other grounds*, 350 F.2d 884 (10th Cir. 1965). For a sample of the Board's arguments using these cases, see Brief for the NLRB in Opposition to Plaintiff's Motion for Preliminary Injunction 11-14, Caulfield v. Hirsch, Civ. No. 76-279 (E.D. Pa. 1977).

245. *Compare* Wisconsin v. Yoder, 406 U.S. 205 (1972) *with* authorities cited in note 244, *supra; cf.* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).

246. *Free Exercise Clause*, *supra* note 8, at 670-71.

247. As explained in text following notes 126 and 156 *supra*, those circumstances (entanglement and intrusion) form the gravamen of the parochial schools' free exercise and establishment clause claims.

zations, which have compounded first amendment rights through free exercise and associational interests, merit a different constitutional treatment than do the religious freedom contentions of individuals.[248]

In the context of government regulation of church schools, the appropriate treatment must account for the presence of extraordinary free exercise interests in one of organized religion's primary functions—the transference of shared values and beliefs from one generation to the next. Church schools represent the collective interests of parents in rearing their children. Certainly, parochial schools offer parents a meaningful choice in guiding the education, religious upbringing, and value acquisitions of their offspring. As shown above,[249] such parental interests add weight to the free exercise side of the balancing process. The resultant burden on the NLRB is telling.

Thus, the first amendment interests of parochial schools outweigh the government's interests in labor regulation of the schools, and the NLRB cannot show that its jurisdiction over parochial schools is necessary to effectuate the NLRA's purposes. The slight degree to which those schools might either adversely affect commerce or discourage employee organization legitimizes neither the dangerous potential for excessive entanglement between the Board and the schools nor the inhibitory effects that Board regulation is likely to have on the schools and their religious-educational purposes.

E. *The AP Case and Incipient Dangers*

The Court has previously addressed a first amendment challenge to application of the NLRA to a particular employer. *Associated Press v. NLRB*[250] held that the Board can order reinstatement and backpay for an editorial employee of an organization that gathers and disseminates news, if the reasons for the discharge had been the employees' union activities. Even though the federal government could not interfere with AP's rights to make personnel decisions on the basis of employee performance or conformity to editorial policy,

248. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

249. Notes 65-69 and accompanying text *supra*. *See also* notes 305-308 and accompanying text *infra*.

250. 301 U.S. 103 (1937). The decision was one of a composite of decisions that the Court addressed in sustaining the constitutionality of the NLRA. The major holding was in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

Congress could restrict the employer's ability to retaliate against an employee for his organizational efforts.

Certainly *AP v. NLRB* lends support to the Board's position that it can constitutionally regulate parochial schools, yet there are fundamental distinctions between *AP* and the schools' circumstances; and those distinctions severely limit the case's authority in a church school challenge. The most obvious, and the most telling, difference is that *AP* did not involve a religious institution. The distinction has substance not because freedom of religion is more important than freedom of the press, but because the nature of the NLRB's conduct is more likely to offend the former than the latter. While there are limits to the degree to which government can involve itself with the press,[251] only in freedom of religion cases has the Court defined substantial limits on excessive government entanglement with private institutions. Only freedom of religion has an establishment, as well as a free exercise, clause.[252]

Religion does add special considerations. Thus the Court has stated that in some circumstances religiously motivated activity will be protected, while secular-based conduct of the same nature would not be. For example, the Court's opinion in *Yoder* carefully limited its holding to religious groups like the Amish, and distinguished groups whose common beliefs were not intertwined with religion, even though the latter groups could have substantial associational and free speech rights affected by compulsory education.[253] Moreover, the Associated Press, publishers, and newspapers have been held subject to the antitrust laws.[254] Does it follow that the

251. At least, one would assume that there are some limits after reading cases restricting government's ability to make editorial decisions. *E.g.*, Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) New York Times Co. v. United States, 403 U.S. 713 (1971). *See* Landmark Communications Inc. v. Virginia, 98 S. Ct. 1535, 1546 (1978) (Stewart, J., concurring). That assumption, however, has been questioned by holdings authorizing (*inter alia*) searches of newsrooms without a prior adversarial hearing and use of the contempt power to secure newsmen's sources. *E.g.*, Zurcher v. Stanford Daily, 436 U.S. 547 (1978); Branzburg v. Hayes, 408 U.S. 665 (1972).

252. That is not to say, however, that there may not be some kind of an implied "establishment clause" limitation (independent of religion) on government's power to propagandize or exercise thought control. *See* Joyner v. Whiting, 477 F.2d 456, 461-62 (4th Cir. 1973); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 697-716 (1970); Gottlieb, *Government Allocation of First Amendment Resources*, 40 U. PITT. L. REV. (forthcoming 1979). *See also* authorities in notes 37-40 and 188-189 *supra*.

253. 406 U.S. at 235-36.

254. Associated Press v. United States, 326 U.S. 1 (1945). *See also* Citizens Publishing Co. v. United States, 394 U.S. 131 (1969).

federal government could bust parochial school monopolies or preclude their mergers? That is a very grim, and fortunately improbable, prospect. Finally, the *AP* majority was wholly unconcerned about the likelihood of future invasions of freedom of the press; the Court said it would handle those problems when they arise.[255] In religious freedom cases, however, the Court has persistently avoided even the potential for excessive church-state entanglement.[256]

Of course, in 1937, the date of *AP's* decision, the Court would have needed Cassandra-like prescience to appreciate the expansive nature of government regulation. New Deal reform was in its early stages, and the judiciary was reluctant to overturn any legislative or administrative action. Had the Court comprehended the eroding tendency of government agencies, it may have been more sensitive to AP's concerns for potential first amendment impairments.[257]

Since 1937, the Court has developed that sensitivity in establishment clause decisions and has been extremely cautious in approving any church-state relations lest it launch a trend that would be difficult to stop. That danger should weigh heavily in considering NLRB jurisdiction over parochial schools. Permitting such regulation, which is aimed at the very heart of religious value transference—adolescent education in church and synagogue schools—would license the now gargantuan government agencies to scrutinize freely the activities of religious institutions. The Court's warning in *Lemon* should be heeded:[258]

> [M]odern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support. Nor can we fail to see that in constitutional adjudication some steps, which when taken were thought to approach "the verge," have become the platform for yet further

255. 301 U.S. at 131-32.

256. *See* authorities cited in note 140 *supra;* note 258 and accompanying text *infra.*

257. That is to suggest that *AP* may well have been wrongly decided. Freedom of the press has experienced great doctrinal changes since 1937, and *AP's* facts could bring about a different result today. In 1957, Justice Sutherland's dissent on first amendment grounds drew four votes. 301 U.S. at 133-41.

258. Lemon v. Kurtzman, 403 U.S. at 624. *See also* PEARL v. Nyquist, 413 U.S. at 797 n.56; Everson v. Board of Educ., 330 U.S. at 29 and *passim* (Rutledge, J., dissenting); *cf.* authorities cited in note 191 *supra* (threat of burgeoning administrative regulation can have a "chilling effect" on parochial schools' free exercise rights).

> steps . . . . The dangers are increased by the difficulty of perceiving in advance exactly where the "verge" of the precipice lies.

Protection of sectarian independence thus requires meticulous analysis, in any regulatory case, of the nature of the state involvement and interests. Courts should not approve government regulation of a religiously-affiliated institution unless completely satisfied that the state will not effect church policy through inhibitory effects or excessive entanglement.

IV. The Controlling First Amendment Values

The Supreme Court has often noted a "tension" between the establishment and free exercise clauses. The nature of that tension, however, has not been fully articulated. At times, the clauses have been described as potentially conflicting: "it may often not be possible to promote the [free exercise clause] without offending the [establishment clause]."[259] Both clauses are "cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[260] Yet, even though "they forbid two quite different kinds of governmental encroachment upon religious freedom"[261] the two clauses frequently overlap.

The Court has responded to this constitutional ambivalence by proclaiming a policy of neutrality in religious affairs[262] and by accommodating free exercise and establishment concerns through doctrinal flexibility.[263] The Court has found this "play-in-the-joints"[264] to be essential in a society in which some church-

259. PEARL v. Nyquist, 413 U.S. 756, 788 (1973).

260. Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970).

261. Abington School Dist. v. Schempp, 374 U.S. 203 (1963), *quoting* Engle v. Vitale, 270 U.S. 421, 430-31 (1962).

262. *E.g.*, PEARL v. Nyquist, 413 U.S. at 788; Wisconsin v. Yoder, 406 U.S. at 234-35 n.22; Walz v. Tax Comm'n, 397 U.S. at 669; Sherbert v. Verner, 374 U.S. at 409.

263. *E.g.*, Wisconsin v. Yoder, 406 U.S. at 221; Walz v. Tax Comm'n, 397 U.S. at 669. The relationship between the religious clauses can be viewed as symbiotic, especially in the sense that the free exercise clause legitimates certain actions that advance (or accommodate) religion but that would otherwise violate the establishment clause. Dodge, *supra* note 113, at 705-06. *See* Freund, *supra* note 101, at 1686; notes 113-115 and accompanying text *supra*. *See generally*, Gianella, *supra* note 113. Examples of such a relationship are property tax exemptions for churches (*Walz, supra*) and exemptions from compulsory school attendance for Amish (*Yoder, supra*).

264. Walz v. Tax Comm'n, 397 U.S. at 669. *But see* Everson v. Board of Education, 330 U.S. at 26 (Jackson, J., dissenting) ("This freedom [of religion] was first in the Bill of Rights

government contact is unavoidable. An accommodating flexibility, with neutrality as the goal, has thus been offered as a comprehensive rationale for free exercise-establishment clause conflict.

Certainly, that is one approach to the problem; but it avoids some tough analysis. "Neutrality," while surely a first amendment concern, is too elusive a concept to withstand substantial reliance.[265] For example, the Court claimed to be steering neutral courses (as always) in *Yoder* and *Sherbert*. In *Yoder,* was not Wisconsin neutral in treating all parents similarly? In *Sherbert,* had not South Carolina subjected all unemployment compensation applicants to the same regulations? Were not these individuals asking for special dispensation from the State? In the establishment clause parochial cases, were not parents of church school children entitled to get educational returns on their tax dollars the same as any other parents?[266] Why should the former pay double? Would not tuition reimbursements for parochial school parents "neutralize" that injustice? Is there any consistent pattern of "neutrality" to the answers the Court has reached on these questions? Indeed, the justices have frankly admitted that logic has not been the hallmark of their decisions in these and similar cases.[267] No one can dispute that government should be neutral in addressing religion, that it should neither advance nor inhibit one religion, all religions, or no religion, but "neutrality" is a goal more easily stated than achieved and is not easily reduced to principles for application in individual instances of constitutional adjudication.

Nevertheless, there are broad democratic values that both undergird the first amendment and justify the results in most of the religious freedom cases. These values have been expressed at times by members of the Court. They are interwoven with the rationales for other first amendment provisions, and they offer substantial guidance in delicately balancing competing interests and in reaching results in actual cases.

The values are related, yet distinct. One is a utilitarian preference for pluralism—especially in those matters which are the first amendment's primary concern—ideas and beliefs. The other is a

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because it was first in the forefathers' minds: it was set forth in absolute terms, and its strength is its rigidity").

265. *See, e.g.,* Freund, *supra* note 101, at 1686.

266. *But see* Everson v. Board of Educ., 330 U.S. at 58-60 (Rutledge, J., dissenting).

267. *E.g.,* Wolman v. Walter, 433 U.S. at 257 (Marshall, J., concurring and dissenting); *id.* at 262 (Powell, J., concurring and dissenting); Lemon v. Kurtzman, 403 U.S. at 614.

genuine commitment to the worth of the individual: in certain matters—again those addressed by the first amendment—the individual should be the supreme decision-maker.[268] These two values have formed a bulwark in our constitutional history and demand application in any free exercise-establishment clause overlap.

Pluralism in religious creed and in expression has been a keystone in our history. From the earliest colonial days through the present, individuals and groups have settled in America to escape religious persecution abroad. This background was foremost in the founders' minds when they drafted the Bill of Rights.[269] The United States has continued to be a haven for political, religious, and economic refugees. The country has absorbed and accepted, though often painfully, these immigrants with strange languages and religions. The diversity and breadth of insights, culture, and experience they have contributed have become a national treasure.[270]

The value in this heritage depends upon the abilities of the diverse groups and individuals to contribute to our society while still retaining their own philosophical, cultural, and religious identities, should they so desire. The first amendment encourages development and preservation both of cultures and ideas that have been imported and of those that have been conceived and nurtured within the United States. Through this diversity, we achieve a

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268. *See* Whitney v. California, 274 U.S. 357, 374-76 (1927); 1 N. DORSEN, P. BENDER, & B. NEUBORNE, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 3-9 (4th ed. 1976); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 576-79 (1978); *Constitutional Definition*, *supra* note 102, at 1058. *See also* Note, Cultural Pluralism, 13 HARV. C.R.-C.L. L. REV. 133 (1978) [hereafter cited as *Cultural Pluralism*]; Note, *Toward a Constitutional Theory of Individuality: The Privacy Opinions of Justice Douglas*, 87 YALE L.J. 1579 (1978) [hereafter cited as *Individuality*].

Cultural Pluralism identifies three first amendment rationales: freedom of conscience as a good in itself, as a precondition of emotional well-being, and as promoting pluralism. Concededly, that is a valid, and perhaps philosophically necessary, breakdown. This article asserts, however, that the first and second rationales mutually premise the constitutional individualism described in the text. *See* notes 288-293 and accompanying text *infra*.

269. Abington School Dist. v. Schempp, 374 U.S. 203, 214 (1963) ("Nothing but the most telling of personal experiences in religious persecution suffered by our forebears . . . could have planted our belief in liberty of religious opinion any more deeply in our heritage."); Everson v. Board of Educ., 330 U.S. at 8-11; *id.* at 33-43 (Rutledge, J., dissenting); *Cultural Pluralism*, *supra* note 268, at 133.

270. Wisconsin v. Yoder, 406 U.S. at 216-19; Walz v. Tax Comm'n, 397 U.S. at 689; West Virginia State Bd. of Educ. v. Barnette, 319 U.S. at 64-42 (1943); H. KALLEN, CULTURAL PLURALISM AND THE AMERICAN IDEA (1956); *Cultural Pluralism*, *supra* note 108, especially at 133-36 and n.15; *Constitutional Definition*, *supra* note 102, at 1058-60. Pluralism, of course, facilitates freedom of choice and belief by offering and preserving the greatest selection of ideas and beliefs. *Id.*

richer society, one that can thrive on the multiplicity of expression and perceptions while, hopefully, sorting out the valuable ideas and customs from those that are based on prejudice or error.

The Supreme Court has acknowledged and supported pluralistic goals. *Meyer v. Nebraska,*[271] *Pierce v. Society of Sisters,*[272] and *Wisconsin v. Yoder*[273] are prime examples. Each recognized the state's interest in having individuals educated and integrated into society, yet each decision also recognized a constitutional interest in allowing religious or ethnic sects to educate their own, so long as they meet certain minimum instructional standards. *Meyer* thus invalidated a state ban on foreign language instruction; *Pierce* recognized the right to private and parochial education; *Yoder* upheld the rights of the Amish to train their children in the Amish way of life. The decisions were premised upon the constitutional preference to preserve diversity.

Each provision of the first amendment thrives on pluralism.[274] Basic utilitarian theory makes the effectiveness of the rights of speech and press directly proportionate to the number and variety of voices and publishers. The marketplace of ideas prospers when there is a great diversity of expressed opinions. Society is thereby better informed and more capable of deciding important social and political questions.

Pluralism through group expression also promotes first amendment goals; and this pluralism has found protection through the amendment's freedom of assembly, speech, and religion clauses.[275] This right to organize, join, and participate in groups facilitates effective communication. The more diverse groups there are, the greater the quality of the marketplace.

The amendment's dependence on a pluralistic society is pervasive and heavy. Promoting pluralism promotes the first amendment. Judge Learned Hand eloquently described the relationship in

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271. 262 U.S. 390 (1923).

272. 268 U.S. 510 (1925).

273. 406 U.S. 205 (1972). *Accord* Ohio v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).

274. New York Times v. Sullivan, 376 U.S. 254 (1964); United States v. Associated Press, 52 F. Supp. 362, 273-74 (S.D.N.Y. 1943) (L. Hand., J.), *aff'd,* 326 U.S. 1 (1945); *Cultural Pluralism, supra* note 268, at 138-43. *See* authorities cited and discussed in notes 268-270 *supra.*

275. *E.g.,* Healy v. James, 408 U.S. 169 (1972); Shelton v. Tucker, 364 U.S. 479 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); DeJonge v. Oregon, 299 U.S. 353 (1937).

United States v. Associated Press,[276] which rejected *AP's* free press defense to an antitrust action for monopolistic practices:

> [N]either exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests; the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.

Preserving pluralism has been especially important in construing the religion clauses. As stated, the clauses grew out of the founders' exposure to religious persecution and the bitter divisiveness that followed from government compulsion and prohibition of religious faith. By promoting and guaranteeing diversity, the founders were able to reduce such malice and tension. The greater the availability of diverse religious groups and teachings, the more tolerant a society will likely be. The mere presence of having constitutional restraints can have a positive psychological impact.[277]

Nowhere has governmental action been so threatening to religious pluralism as in the Supreme Court's establishment clause cases regarding elementary and secondary schools. Two general schemes have presented themselves. First, the states attempted, through their public schools, to conduct religious exercises, specifically, organized released time activities, Bible readings, and daily prayer. By reason of the State's powerful imprimatur,[278] these exercises coerced a conformity to the prevailing Christian religion and wore down those with nonconforming faiths. The Supreme Court, therefore, invalidated the conduct of any religious exercises in the public schools.

The Court's opinions on state aid to parochial schools evidence the same commitment to pluralism. At first glance, the cases may

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276. 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd,* 326 U.S. 1 (1945).

277. *See* Freund, *supra* note 101, at 1692 ("It was healthy when President Kennedy, as a candidate, was able to turn off some of the questions addressed to him on church-state relations by pointing to binding Supreme Court decisions.").

278. Abington School Dist. v. Schempp, 374 U.S. at 221; Engle v. Vitale, 370 U.S. 421, 430-31 (1962).

appear to run counter to perpetuation of the church school systems. Yet the Court has shown great insight in recognizing that government aid is usually followed by government regulation.[279] At the very least, the schools can become dependent upon the government aid, and will compromise their religious goals in order to avoid offending or displeasing government officials. In turn, the leverage commanded by those officials over the church schools could become frighteningly potent. This process necessarily leads to secularization and homogenization of the creed.[280] Thus, the Supreme Court has limited state aid to church schools to reimbursement for services that satisfy a state need but neither present the opportunity for religious inculcation nor are related to the church schools' basic instructional mission.[281]

The threats to pluralism posed by the government's actions in the two lines of establishment clause cases, as well as in the *Meyer-Pierce-Yoder* decisions, are particularly formidable because the actions are directed at primary and secondary education, where everyone in this country spends his/her formative years. That makes those schools the most effective means for transmitting information and infusing values.[282] For example, public education here has traditionally been the great melting pot. The state has seized the opportunity to inculcate and conform impressionable youth to prevailing perceptions and roles.[283] That may be valuable

279. *E.g.*, Lemon v. Kurtzman, 403 U.S. at 621; Walz v. Tax Comm'n, 397 U.S. at 675; Everson v. Board of Educ., 330 U.S. at 27-28 (Jackson, J., dissenting) ("If the state may aid these religious schools, it may therefore regulate them.") *See* authorities in and accompanying text to note 141 *supra* and note 280 *infra*.

280. Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 772 (1976) (Brennan, J., dissenting); *id.* at 775 (Stevens, J., dissenting); Lemon v. Kurtzman, 403 U.S. at 621; *id.* at 649 (Brennan, J., concurring); Freund, *supra* note 101, at 1685-86.

281. *E.g.*, Wolman v. Walter, 433 U.S. 229 (1977); *see* text accompanying notes 86-123 and 156-236 *supra*.

282. *E.g.*, In re Shinn, 16 Cal. Rptr. 165, 168 (1961); Stephens v. Bongart, 15 N.J. Misc. 80, 189 A. 131, 137 (1937); Berkman, *Students in Court: Free Speech and the Functions of Schooling in America*, 40 HARV. EDUC. REV. 567, 569 (1970); Woltz, *Compulsory Attendance at School*, 20 L. & CONTEMP. PROBS. 3 (1955). *See generally Michigan Special Project*, *supra* note 126. *See also* Hutchins, *The Schools Must Stay*, 6 CENTER MAG. 12 (Jan/Feb. 1973); McClintock, *Universal Voluntary Study*, *id.* at 24.

283. *E.g.*, L. CREMIN, THE TRANSFORMATION OF THE SCHOOL 66-75 (1962); R. KAY, OUR AMERICAN EDUCATIONAL SYSTEM 8 (1969); C. TESCONI, SCHOOLING IN AMERICA 147-72 (1975); D. TYACK, TURNINGPOINTS IN AMERICAN EDUCATIONAL HISTORY 228-63 (1967); Reutter, *The Law and the Curriculum*, 20 L. & CONTEMP. PROBS. 91 (1955); Seitz, *Control of Textbook Selection*, *id.* at 104; authorities cited in notes 38, 40, 186, 188-89, & 282 *supra*.

to a degree; but it quite obviously can endanger, among other things, a society's pluralism.[284]

Whatever public education's status is, our systems of parochial schools have offered and continue to offer an alternative. They have provided an opportunity for parents to educate their children in a fashion that allows inclusion of religious thought at approprate moments and in conjunction with the secular training. (Some experts believe that method to be essential for a complete, meaningful education).[285] Of course, indoctrination of impressionable youth occurs in church schools; that is one of the schools' avowed purposes. The students are urged to conform to the sect's philosophy. Parents at least have a choice, and religious and cultural diversity has a better opportunity to survive when parochial schools are assured of an independent operation. The Court deserves plaudits for helping to sustain that independence from the State.

These concerns for pluralism have significance for the NLRB's efforts to regulate parochial schools. Through such regulation, the schools are compelled to conform to a certain model. As described above, that model holds a dangerous potential for compromising the school on its sectarian philosophy, chiefly through compulsory bargaining on selected subjects and monitoring of hiring, firing, and other personnel decisions. Such regulation is particularly offensive because parochial schools would be subjected to the "strings" that go with government dollars, but would not be eligible for the dollars.[286] Moreover, NLRB regulation would be a giant leap onto a very slippery slope; more government regulation would surely lie further down the slope. The threat to our pluralism at its most susceptible point—the education of youth—would be substantial.[287]

The second value that underpins the religion clauses is a fundamental precept of the first amendment, as well as of the entire Bill

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284. *See, e.g.*, DeFunis v. Odegaard, 416 U.S. 312, 334-35 (1974) (Douglas, J., dissenting from remand on mootness grounds); New Rider v. Board of Educ., 414 U.S. 1097, 1097-1103 (1973) (Douglas, J., dissenting from denial of cert.); Wisconsin v. Yoder, 406 U.S. at 215-19; Epperson v. Arkansas, 393 U.S. 97 (1968); Emerson & Haber, *The Scopes Case in Modern Dress*, 27 U. CHI. L. REV. 522 (1960); Kalven, *A Commemorative Case Note: Scopes v. State*, *id.* at 505; authorities cited in notes 188-89 *supra*.

285. *See* Everson v. Board of Educ., 330 U.S. at 46-47 (Rutledge, J., dissenting); BOWER, CHURCH AND STATE IN EDUCATION 58 (1944); notes 165-68 and accompanying text *supra*. *See also* S. BROWN, THE SECULARIZATION OF AMERICAN EDUCATION 1-25 (1912, reissued 1967).

286. Catholic Bishop of Chicago v. NLRB, 559 F.2d at 1119, 1130: notes 142-143 and accompanying text *supra; cf.* notes 141, 279-280 and accompanying text *supra*.

287. Wisconsin v. Yoder, 406 U.S. at 209-12; *Cultural Pluralism*, *supra* note 268, at 146-72.

of Rights and the fourteenth amendment.[288] The thrust of the first amendment elevates the individual to supreme decision-maker in matters of ideas and conscience, and makes the freedoms of religion, speech, press, and association ends in themselves.[289] The amendment also reflects the belief that the "pursuit of happiness" or, in more modern language, psychological well-being, is dependent upon one's freedom to speak, write, associate, and believe as one pleases.[290] Although we have recognized more utilitarian justifications for the first amendment,[291] the inherent value in letting an individual speak and believe as he pleases is just as, if not more, important a rationale. As a corollary to its protection of the need for expression, the first amendment makes the individual a fortress protected against government compulsion or thought control.[292]

Each of the first amendment's provisions sustains a rugged individualism. Thus public expression may be protected even though it is offensive to some,[293] or is generally recognized as potentially dangerous,[294] or is made within the halls of a public school.[295] Despite

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288. *See* Griswold v. Connecticut, 381 U.S. 479 (1965). *Individualism, supra* note 268. For a more global perspective on this value, *see generally* McDougal, Lasswell, & Chen, *The Right to Religious Freedom and World Public Order: The Emerging Norm of Nondiscrimination,* 74 MICH. L. REV. 865 (1976).

289. Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., dissenting); discussion and authorities cited in note 268 *supra.*

290. *E.g.,* Clark, *Guidelines for the Free Exercise Clause,* 83 HARV. L. REV. 327, 342 (1969) ("[T]he most important interest protected by the free exercise clause is the prevention of the severe psychic turmoil that can be brought about by compelled violations of conscience."); *Constitutional Definition, supra* note 102, at 1058.

291. Scholars and the Court alike have noted that the first amendment establishes and protects a marketplace of ideas designed to foster political exchange, to promote new and valuable ideas, to search for the truth, etc. *E.g.,* New York Times v. Sullivan, 376 U.S. 254 (1964); DORSEN, *supra* note 268, at 4-7, *quoting* J.S. MILL, ON LIBERTY 15, 24-25, 30-31, 40-41, 47-48 (McCallum ed. 1946). *See generally* A. MEIKLEJOHN, POLITICAL FREEDOM (1960); notes 270-277 and accompanying text *supra.*

292. *E.g.,* Wooley v. Maynard, 430 U.S. 705 (1977); Lehman v. City of Shaker Heights, 418 U.S. 298, 307-08 (1974) (Douglas, J., concurring in judgment); Stanley v. Georgia, 394 U.S. 557, 565-66 (1969); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688-89 (1959); P.U.C. v. Pollak, 343 U.S. 451, 469 (1952) (Douglas, J., dissenting); West Virginia Board of Educ. v. Barnette, 319 U.S. 624 (1943); Lipp v. Morris, 579 F.2d 834 (3rd Cir. 1978) (school children could not be forced to stand at attention during pledge of allegiance to the flag); Emerson & Haber, *supra* note 284; Kalven, *id.*

293. *E.g.,* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (ordinance proscribing exhibition of nudity on outdoor movie screen violated first amendment); Cohen v. California, 403 U.S. 15 (1971) ("Fuck the Draft" on back of jacket could not be punished under a disturbing the peace ordinance).

294. *E.g.,* Brandenburg v. Ohio, 395 U.S. 444 (1969); Gregory v. Chicago, 394 U.S. 111 (1969).

the near worthlessness of some speech, countervailing state interests cannot override a person's need for self-expression without a showing of compelling neccessity.[296] The provisions of the first amendment which protect individuals and the press from state coercion are also matters of speech and conscience[297] and create a zone of individual privacy into which government cannot intrude.[298] The NAACP cases guaranteed that a right to anonymity in one's organizational activities and memberships attends the right to association.[299] *Talley v. California*[300] assured the same anonymity in the distribution of printed materials. The Court has recognized rights within the home both to read whatever one pleases and to be free from unwanted communication. These protections are premised upon a recognition of the supremacy and worth of the individual within certain spheres.[301]

This concept of individualism was deemed by the first amendment's authors to be most critical in matters of religion. The founders specifically included both an establishment and a free exercise clause to be certain that government did not interfere in religious concerns.[302] The Supreme Court has honored that mandate in its decisions. Thus, "the realm of religious training and belief remains, as the amendment made it, the kingdom of the individual man and

295. *E.g.*, Tinker v. Des Moines Ind. Commun. School District, 393 U.S. 503 (1969) (students' rights to wear black arm band in protest of Viet Nam War); West Virginia Board of Educ. v. Barnette, 319 U.S. 624 (1943) (right to refuse to pledge allegiance to the flag). Of course, faculty and students cannot make a Hyde Park out of public schools, but the cases do reflect a Supreme Court concern that students retain their individualism. For a contrast in views among the justices over the appropriate role for students in public schools, *compare Tinker, supra* (majority opinion) *with id.* at 522-23 (Black J., dissenting) ("[T]axpayers send children to school on the premise that at their age they need to learn, not teach.").

296. *E.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940).

297. *E.g.*, Landmark Commun., Inc. v. Virginia, 436 U.S. 1535, 1546 (1978) (Stewart, J., concurring); Wooley v. Maynard, 430 U.S. 705 (1977); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

298. *E.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965). *But see* Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

299. Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958). *See also* Baird v. State Bar of Ariz., 401 U.S. 1 (1971); Elfbrandt v. Russell, 384 U.S. 11 (1966).

300. 362 U.S. 60 (1960).

301. Stanley v. Georgia, 394 U.S. 557 (1969); Rowan v. Post Office Dept., 397 U.S. 728 (1970).

302. *See, e.g.*, Abington School Dist. v. Schempp, 374 U.S. at 215-22; McCollum v. Board of Education, 333 U.S. 203, 227 (Frankfurter, J., concurring); Everson v. Bd. of Educ., 330 U.S. at 14-15; *id.* at 23-24, 26-27 (Jackson, J., concurring). *See also* Epperson v. Arkansas, 393 U.S. 97 (1968); West Virginia Board of Educ. v. Barnett, 319 U.S. 624 (1943).

his God."[303] The individual's choice in religious matters must be kept "inviolately private."[304]

The religion clauses, with their dual protection, have justifiably commanded special attention in sealing off an area for individual privacy and in repelling government attempts to control matters of conscience. Our culture views religion as the most sensitive and personal of life's elements, as the root from which all other values and traditions grow. Nothing lies so close to the individual's conscience as his feelings towards his God. Historically, religious controversies have provoked the most emotional (and, therefore, frequently irrational) responses. Like the individualist-centered interpretation of the first amendment, there is an irreducible, value-basic quality to much of religious thinking. Fundamental and intimate considerations of family, love, death, and sex intertwine with religion.

The Supreme Court in *Pierce* and *Yoder,* therefore, committed religious education and upbringing to the family's and the church's private processes. *West Virginia State Board of Education v. Barnette*[305] protected public school children from a state attempt at thought control by requiring a religious exemption from compulsory pledges to the flag.[306] The free exercise and establishment clauses combine here to build a barrier around the individual and to guarantee private decision-making in religious affairs.

In practical terms, the private decision-making processes protected by this individualism include not only the choice made by a family to send a child to a parochial school, but also the parochial school's operations.[307] "The Constitution decrees that religion must

303. 330 U.S. at 57-58 (Rutledge, J., dissenting). This right is particularly critical in parental choices concerning education of their offspring. Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925). For a discussion of the need for freedom of choice in family education decisions and on the extent of intrusive state control, see Coons & Sugarman, *Family Choice in Education: A Model State System for Vouchers,* 59 CALIF. L. REV. 321, 324-25 (1971). *See also* discussions of the concept of "voluntarism" by Professor Freund and Justice Harlan in, respectively, Freund, *supra* note 101, at 1684-86, and Walz v. Tax Comm'n, 397 U.S. at 694-97.

304. Everson v. Board of Educ., 330 U.S. at 58 (Rutledge, J., dissenting). *See also id.* at 51.

305. 319 U.S. 624 (1943).

306. *Accord,* Goetz v. Ansell, 477 F.2d 636 (3d Cir. 1973); Spence v. Bailey, 465 F.2d 794 (6th Cir. 1972). *See also* Lipp v. Morris, 579 F.2d 834 (3d Cir. 1978); authorities cited in notes 38, 40, 252, 284, & 295 *supra. But see* Hamilton v. Regents, 293 U.S. 245 (1934).

307. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Ohio v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976). *See also* Walz v. Tax. Comm'n, 397 U.S. at 672.

be a private matter for the individual, the family, and the institutions of private choice . . . ."[308] Some governmental impact on such schools is inevitable and permissible, but the first amendment will not permit the extent of disruption on schools' and parents' private policy making that would be occasioned by NLRB regulation.

When government regulatory schemes seriously affect religious institutions, courts reviewing challenges cannot decide the case merely by trying to find government "neutrality." The courts' decisions should also reflect the overriding policies of the first amendment, that we constitutionally embrace a pluralistic society and that we have cherished a zone of individualism in religious and private affairs into which the state cannot enter. The analysis in cases such as NLRB regulation should follow the model offered above, in Part III, and the ultimate balancing and tough decisions must be made with full consideration of the two identified first amendment policies.

308. Lemon v. Kurtzman, 403 U.S. at 625. The schools represent both institutional and parental rights in religious education. Pierce v. Society of Sisters, 268 U.S. 510 (1925).